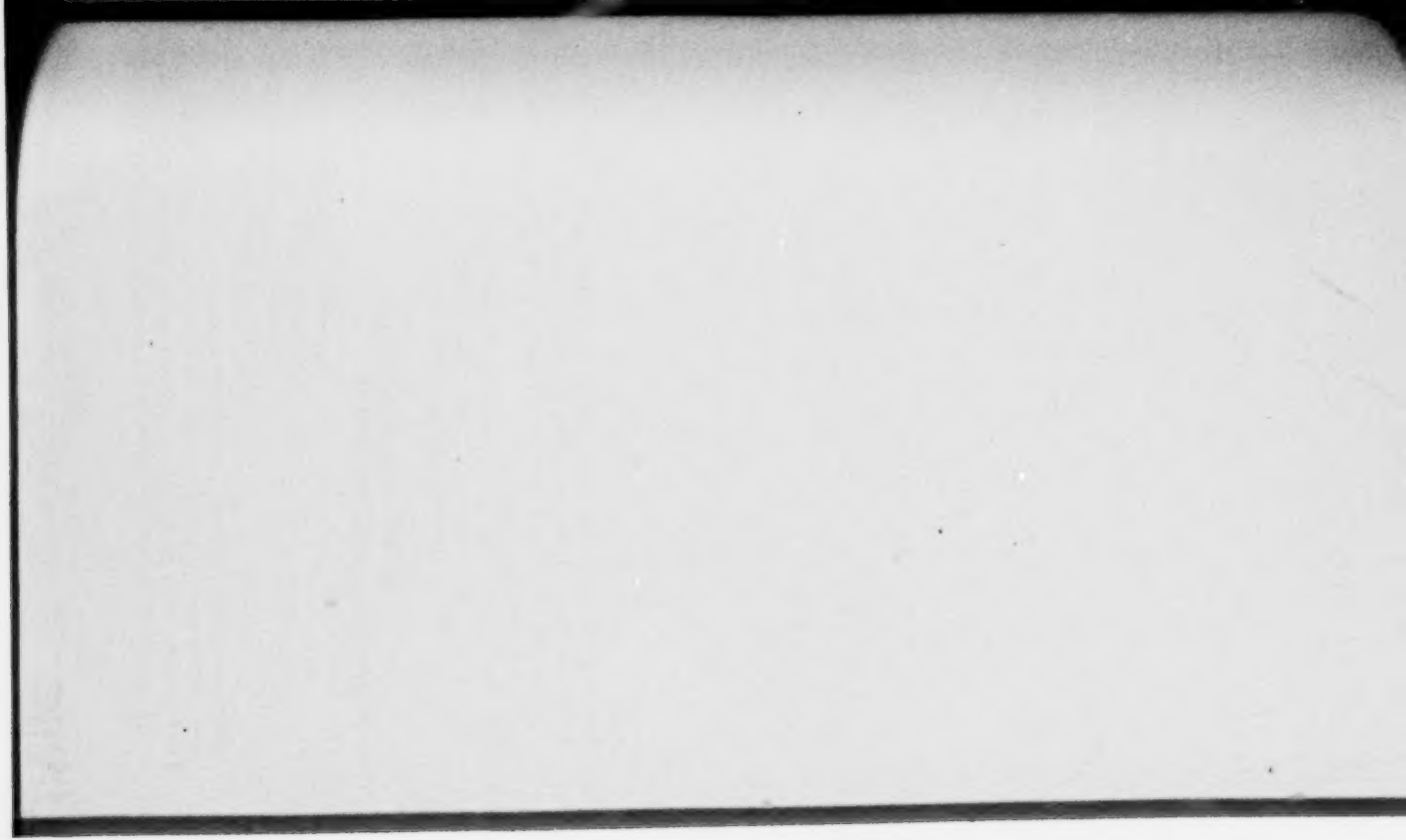

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Supreme Court of the United States

OCTOBER TERM, 1902.

Number 234.

Supreme Court U. S.
FILED
MAR 20 1903
JAMES H. McKENNEY,
Clerk.

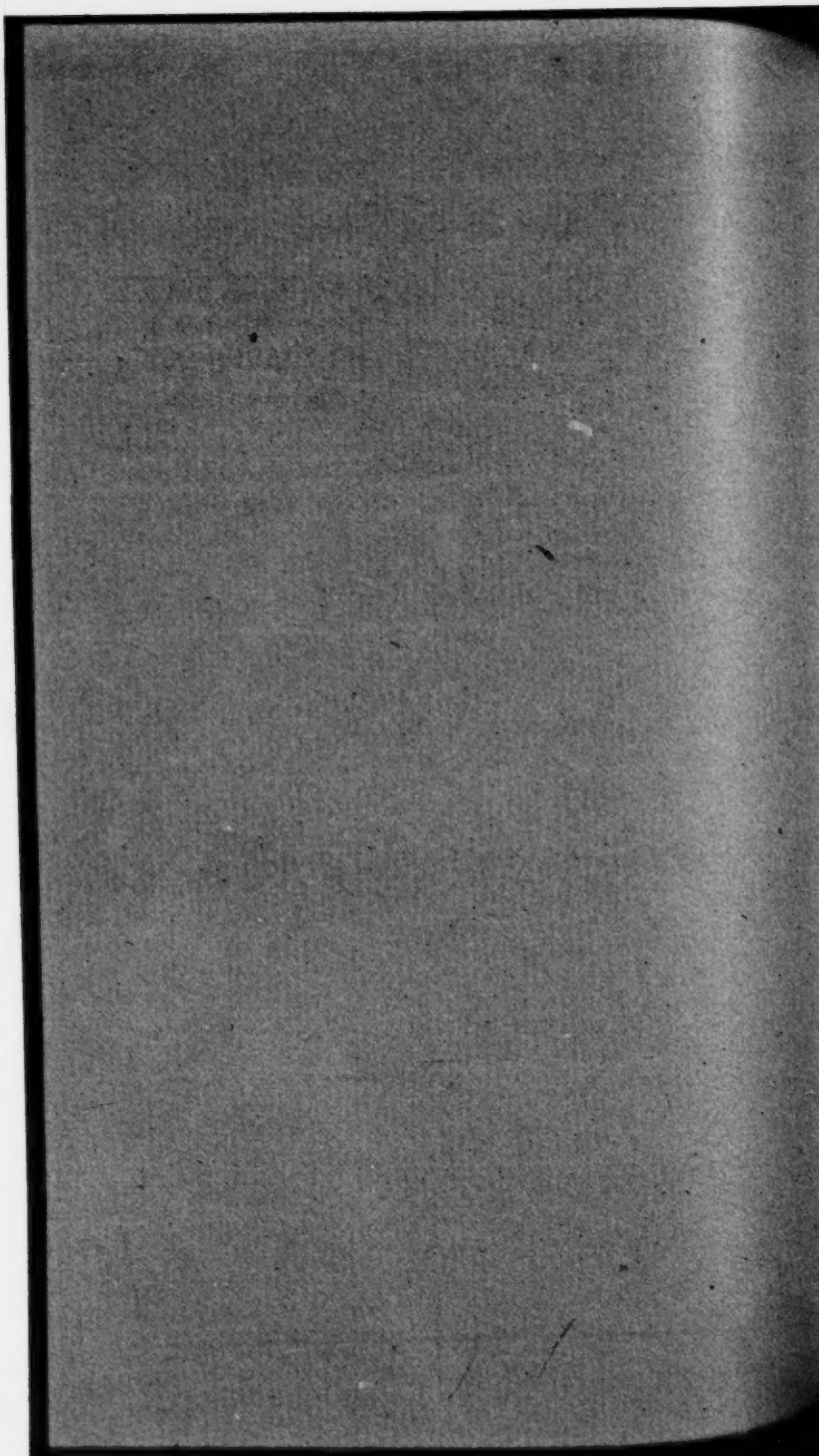
THE ONONDAGA NATION; TE-HEE-HA, SAY-HA-QUE, HOS-HAY-QUA, SHO-HEH-DO-HAH, HA-ON-WEH-GO-WEH-LE, AND JARVIS FARMER, ONONDAGA INDIANS; HO-DO-OH-GO-AH, A SENECA INDIAN; HA-JA-AH-GWYSH, A CAYUGA INDIAN, AND THE UNIVERSITY OF THE STATE OF NEW YORK,

Plaintiffs in Error,

VS.

JOHN BOYD THACHER,

Brief for the Plaintiffs in Error.



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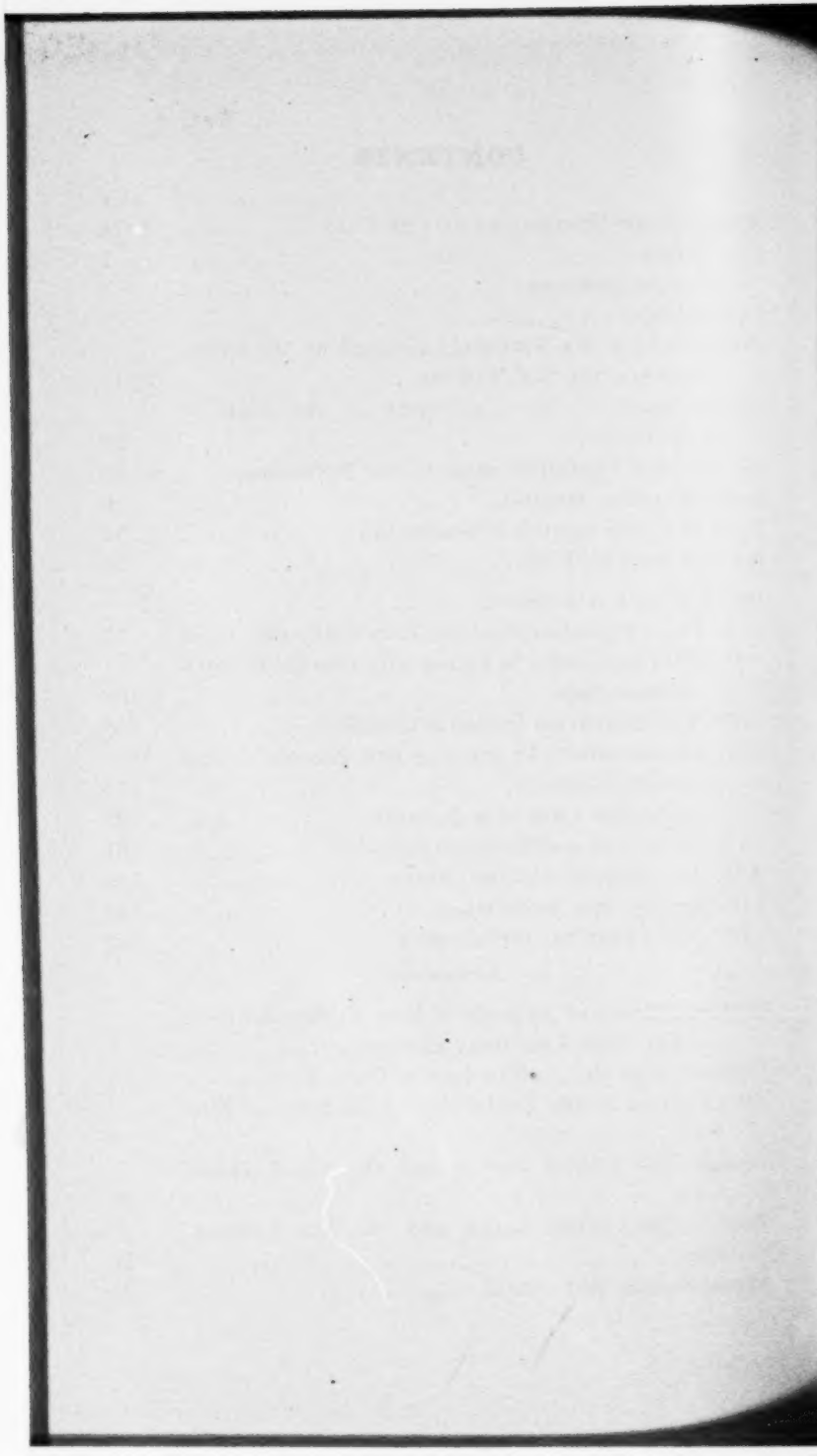

ABSTRACT OR STATEMENT OF THE CASE.

This is a writ of error, which brings up a judgment of the Supreme court of New York, made upon an order of the Court of Appeals of New York, which

AFFIRMED a judgment of the appellate division of the Supreme court of New York for the fourth department of that court, which had

AFFIRMED a judgment of the *special* term of the Supreme court of New York, for the county of Onondaga —the *special* term being, under the practice of that court, the *trial* court, for cases in equity—which judgment had

DISMISSED the complaint of the plaintiffs upon the merits of the action.

The plaintiffs below have been, as already said, beaten all the way through and are the plaintiffs in error here.

FIRST HEAD.—The Action.

The action is a bill in equity which prays that the defendant be enjoined from disposing of, destroying, cutting, mutilating, injuring, concealing, or removing out of the jurisdiction of that court, four wampum records of the people called by themselves Ho-de-no-sau-nee, and by us the Five Nations and the Six Nations, and by the French the Iroquois, and that he *deliver* them to the plaintiffs.

SECOND HEAD.—The Federal Question.

The people which call themselves the Ho-de-no-sau-nee, which are by us down to 1713 called the *Five* Nations, and since then the *Six* Nations—because in that year they took in the Tuscaroras although they did not, and do not yet, allow the Tuscaroras a representation in the general council—and which by the French were and are called the Iroquois—once ruled the country from the Atlantic nearly to the Rockies, and south to the northern borders of Georgia—the Cherokee country.

They then lived, and with the exception of one of the Nations—the Caniengas (Mohawks) they still live upon what they called, and still call, "the highest land on earth"—Schenectady to the Niagara river. The origin of the name being, that, as they said, in their elm bark canoes—the canoe birch does not now grow in our country and the canoes have to be made of elm bark which is not so good because it is much heavier and because the bark will only peel when the sap is running in the spring, and if you break your canoe later in the year you cannot

mend it—they could descend from that land in every way:
1—down the Oswego and Corlear's lake (Champlain) to the St. Lawrence and the Gulf.
2—down North river to the bay of New York.
3—down the South river (Delaware) to Delaware bay.
4—down the Susquehanna to the Chesapeake.
5—down the Alleghaney *to the Gulf of Mexico;* and
6—although Lake Erie is level you have to go down the bank to get to it and then the whole north west country is open—with but a single carry at the Sault Ste. Marie.

They had no written language, but kept their records of things by belts of wampum—which differed in their make—and each of which was the record of some particular event.

In 1794 the United States of America made its first treaty with them. *The white man's copy of that treaty* is in the Secretary of State's office. It is pretty fairly copied in Folwell (2, 437) and Statutes at Large (7, 44), and as good a copy of it as I can make is the last Appendix to this brief.

BUT *the* INDIAN'S RECORD *of that treaty is one of the wampums which this action is about*—the upper one in the lower right-hand picture facing the page 104 of the record—DELIVERED BY GENERAL WASHINGTON HIMSELF.

By that treaty it was provided:

"ARTICLE I.

"Peace and friendship are hereby firmly established, "and shall be perpetual, between the United States and "the Six Nations.

"ARTICLE II.

"The United States acknowledge the lands reserved to "the Oneida, Onondaga and Cayuga Nations, in their re-"spective treaties with the State of New York, and called

"their reservations, to be their property; and the United "States will never claim the same, nor disturb them or "either of the Six Nations, nor their Indian friends resid- "ing thereon and united with them, in the free use and "enjoyment thereof; but the said reservations shall re- "main theirs, until they choose to sell the same to the "people of the United States, who have the right to pur- "chase."

And by the Sixth Article the United States agreed to pay the Six Nations, yearly, four thousand five hundred dollars, and it has done so every year since—*the political department of the government thus recognizing the political existence of the Six Nations and of the Onondaga Nation.*

The details of these will be given later.

This and subsequent treaties are considered in *Fellows* v. *Blacksmith*, 19 How. 366, and *The New York Indians*, 5 Wall. 761, and in those cases, as well as in *The Kansas Indians*, 5 Wall. 737, *Pennock* v. *Commissioners*, 103 U. S. 44, 48, and *Jones* vs. *Meehan*, 175 U. S. 1, 30, it was held that where the government recognized the political existence of an Indian tribe or nation the States must so do.

As for the other three wampum records, they are given in the same picture—one is the record of the original agreement to make the League; another is the record of the *completed* League—this is the central one in the picture—the third is the record of the first coming of people with white faces.

They are the oldest records in North America.

By the laws of the League the Onondaga Nation was made the Keeper of the wampum records of the League, and it had always been the habit of that nation to appoint a single person, known as wampum-keeper, to keep them, and he was required to know, and be able to tell, their meanings. This wampum-keeper down to the time to which we are coming had, with one exception, always been an Indian and an Onondaga. That exception was Zeisberger, the celebrated missionary, who was made wampum-keeper by the Onondagas in 1754.

On the twenty-sixth of February, 1898, the governing council of the Onondagas, at a regular council, regularly called, passed a resolution in the following words:

"*Resolved*, That the University of the State of New "York be and it hereby is elected wampum-keeper of the "Onondaga nation, with full power and it shall be its "duty to get possession of and safely keep forever all "wampums of the Onondaga nation and the Five nations "and Six nations and each of them."

And the record adds:

"Whereupon the University of the State of New York "was unanimously elected to the office of wampum-"keeper."

The University of the State of New York sued, with the Indians, for these wampums, bringing this suit. The question of the power of the University of the State of New York to accept and perform the duty will hardly trouble the Court.

The trial court, after finding that these wampums were league wampums (R. 155, 30–31), found as follows: (R.31.)

"*VI.—That at a time many years prior to the 10th "day of February, 1891, the ancient Confederacy above "referred to, composed first of the five and then of the "six tribes or nations of Indians above mentioned, was "dissolved and thereafter had no active or actual ex-*

"*istence. That its respective names had become associ-*
"*ated with a period long gone by: that the tribes of*
"*which it consisted had become separated, and to a large*
"*extent scattered and dispersed throughout the United*
"*States of America and the Dominion of Canada, and*
"*those who had remained in this country had become*
"*wards of the Government.*

"*VII.—That on and after the happening of the fore-*
"*going events, viz.: the dissolution and disruption of*
"*the said Iroquois Confederacy, the use of the wampum*
"*belts for any of the foregoing purposes for which they*
"*were originally prepared became obsolete. The wam-*
"*pum thereupon became nothiny more than curiosities*
"*and relics of a time, condition and confederation which*
"*had ceased to exist, and the office or position of wam-*
"*pum-keeper, so far as its original significance is con-*
"*cerned, became useless and was abrogated.*"

(R. 33.) "*That said University of the State of New*
"*York never was selected or 'raised up' to the position of*
"*'wampum-keeper,' and no official proceedings were*
"*ever begun on the part of any of the tribes of Indians*
"*which formerly composed said Iroquois Confederacy*
"*for the purpose of conferring any such position or*
"*office upon said University of the State of New York,*
"*assuming that there was at the time of said alleged*
"*proceedings any such official position.*"

And in his opinion the Justice who held the trial court said (R. 161): "Independent of defendant's contention, "that such duties would be quite outside of those for "which said University is supposed to have been organ-"ised, there seems to me to be difficulties with the "claim from the Indians' standpoint. In the light of "all the traditions, not to say romance, which have been "woven into this subject of Indian history, the idea seems "somewhat incongruous of the University of the State of

"New York as the final successor in a line of red-skinned "and pagan wampum keepers reaching back beyond the "days when Hendrik Hudson sailed up the North River.

"Tested also by the somewhat rigid and entirely un- "romantic rules of legal title, I am unable to find suf- "ficient proof that the proceedings taken by the Onon- "daga Indians were sufficient to confer the position of "wampum-keeper, assuming that there is such an one."

And the Appellate Division upon the appeal said (R. 176): "The only plaintiff which can by any possibility "maintain this action, therefore, is the University of the "State of New York. It undoubtedly has power to bring "actions generally. It is a corporation having power to "sue and be sued. It has a state museum under chapter "378 of the Laws of 1892, and an Indian section thereof, "under chapter 586 of the Laws of 1896; and it has "power under the statute to acquire title to such articles "as these wampum belts, and to recover possession "thereof by actions in the courts like the present one. "*It seems to us* RIDICULOUS, *however, to say that it* "*could be constituted a wampum-keeper of any Indian* "*tribe or confederacy.* IT WAS NOT AN INDIAN, and "had no statutory right or power to be constituted an "Indian or wampum-keeper, of the kind indicated by "the evidence given in the case. *This claim is not* "*worthy of any serious consideration.*"

And the Court of Appeals said (R. 189):

"We think the judgment appealed from should be "affirmed upon the ground that neither the Onondaga "Nation, nor the individual Indians named as plaintiffs, "had legal capacity to bring and maintain the action. "(*Strong* v. *Waterman*, 11 Paige, 607, *Seneca Nation* v. "*Christie*, 126 N. Y. 122; *Johnson* v. *Long Island* "*R.R. Co.*, 162 *ib.* 462).

"As to the University of the State of New York, one of

"the plaintiffs, the finding of fact by the trial judge
" 'that the University of the State of New York never
" 'purchased any or either of the wampum belts mentioned
" 'and described in the complaint, and that said Univer-
" 'sity of the State of New York never was selected
" 'or "raised up" to the position or office of "wampum-
" "keeper," and no official proceedings were ever begun
" 'on the part of any of the tribes of Indians which
" 'formerly composed said Iroquois Confederacy for the
" 'purpose of conferring any such position or office upon
" 'said University of the State of New York, assuming
" 'that there is or was, at the time of said alleged pro-
" 'ceedings, any such official position,' is supported by
"evidence, and the judgment having been affirmed at the
"Appellate Division, it is, therefore, conclusive upon us."

And this is *all* which that court did say.

THIRD HEAD. The Findings (R. 30).

"I.—That during a period of many years prior to the
"year 1713, there existed a Confederacy of Iroquois In-
"dians composed of the Onondaga, Oneida, Mohawk,
"Seneca and Cayuga tribes, designated in their own
"language as the Ho-de-no-sau-nee, but known and re-
"ferred to in history as the League of the Five Nations.

"II.—That thereafter and in or about the year 1713,
"another tribe known as the Tuscaroras was received into
"said Confederacy and thereafter the League was known
"and referred to as the League of the Six Nations.

"III.—That during the earliest period of the existence
"of said Confederacy, the Indians of which said League

"was composed made use of strings of wampum beads or "shells braided or pleated together in broad bands and "commonly known as wampum belts, as a means of com- "memorating and preserving the memory of important "events such as the making of treaties, the coming of the "white man, &c., and that while the League of the Iro- "quois was in active existence the tribes or members "thereof composing it employed this method of preserving "the history of the events which they conceived to be of "importance.

"IV.—That while such custom was in vogue the care "and custody of such wampum belts as were so used was "entrusted to the Onondaga Nation, which appointed one "of its members as an official sometimes designated as "the 'wampum-keeper,' whose duty was to preserve "the same and upon ceremonial occasions expound "them and emphasize their meanings and significance.

"V.—THAT THE WAMPUM BELTS MENTIONED AND "DESCRIBED IN THE COMPLAINT IN THIS ACTION CON- "STITUTED A PORTION OF THE WAMPUM BELTS AT ONE "TIME MADE AND POSSESSED BY THE LEAGUE AND USED "FOR THE FOREGOING PURPOSES.

"*VI.—That at a time many years prior to the 10th "day of February, 1891, the ancient Confederacy above "referred to, composed first of the five and then of the "six tribes or nations of Indians above mentioned, was "dissolved and thereafter had no active or actual exist- "ence. That its respective names had become associated "with a period long gone by; that the tribes of which it "consisted had become separated, and to a large extent "scattered and dispersed throughout the United States "of America and the Dominion of Canada, and those "who had remained in this country had become wards "of the Government.*

"VII.—That on and after the happening of the fore-
"going events, viz.: the dissolution and disruption of
"the said Iroquois Confedracy, the use of the wampum
"belts for any of the foregoing purposes for which they
"were originally prepared became obsolete. The wam-
"pum thereupon became nothing more than curiosities
"and relics of a time, condition and confederation which
"had ceased to exist, and the office or position of wam-
"pum-keeper, so far as its original significance is con-
"cerned, became useless and was abrogated.

"VIII.—That on the 10th day of February, 1891, and for
"many years prior thereto, one Thomas Webster, an
"Onondaga Indian, had became the owner and was in
"possession of several of the wampum belts above re-
"ferred to, including those enumerated in the complaint
"herein. That said Webster was not then, and never
"was, an incumbent of the office or position of wampum-
"keeper of the Onondaga Nation or of any of the indi-
"vidual tribes composing the Iroquois Confederacy, and
"that there was at that time no such official position
"known or recognized among the Indians composing any
"or either of said tribes or confederacy. That the in-
"dividual or personal ownership of said Thomas
" Webster in said wampum belts was recognized by the
"said several tribes which formerly constituted said
" League and by the individual members thereof, and
"that said tribes and Indians had long prior to
"that time ceased to treat or regard said wampum belts
"as the property of either the Onondaga Nation or the
" Iroquois League."

Italics and capitals mine.

FOURTH HEAD: The evidence on these two subjects:

First is the treaty of 1794, which contains the following:

"ARTICLE I.

"Peace and friendship are hereby firmly established, "and shall be perpetual, between the United States and "the Six Nations.

"ARTICLE II.

"The United States acknowledge the lands reserved to "the Oneida, Onondaga and Cayuga Nations, in the irre- "spective treaties with the State of New York, and called "their reservations, to be their property; and the United "States will never claim the same, nor disturb them or "either of the Six Nations, nor their Indian friends resid- "ing thereon and united with them, in the free use and "enjoyment thereof; but the said reservations shall "remain theirs, until they choose to sell the same to the "people of the United States, who have the right to pur- "chase."

By the sixth article provision was made for a payment of four thousand five hundred dollars yearly forever (Appendix, post p. 29).

This payment has been made every year since, the appropriation in the

Appropriation Bill of March, 1901

(31 Stat. at Large, p. 1064)

being in the following words:

"SIX NATIONS OF NEW YORK.

"For permanent annuity in clothing and other useful "articles, per sixth article of treaty of November elev- "enth, seventeen hundred and ninety-four, four thousand "five hundred dollars."

"Approved, March 3, 1901" (p. 1085).

There is an United States agent for this (1 Off. Reg. 772). And they are just as numerous as they were in the days of their great Indian Empire (R. 90).

Subsequent treaties made by the United States with these Nations are described by the Court, speaking by Mr. Justice Nelson, in the case of *The New York Indians*, 5 Wall., 761, 766, in the following words:

"These treaties are historical and need not be referred "to, beginning in 1784, and coming down to 1842. That "of 1794, entered into at Canandaigua, New York, "may be cited as a specimen. Third Article, 'The "'United States acknowledge all the land within the "'aforementioned bounds (which include the reserva- "'tions in question) to be the property of the Seneca "'Nation, and the United States will never claim the same "'nor disturb the Seneca Nation, * * * * in the "'free use and enjoyment thereof; but it shall remain "'theirs until they choose to sell the same to the people "'of the United States, who have the right to purchase.'"

These treaties expressly recognise the tribal or national existence of the Six Nations and the Oneidas, Onondagas, Cayugas, Senecas, Tuscaroras and St. Regis Mohawks.

It is needless to remind the Court that but *one* of the *eight* reservations was given up under these treaties, and that the Indians are there in New York yet.

The New York Indians, 173 U. S. 464.

The plaintiff read from Morgan's "The League of the Iroquois," published in Rochester in 1851 (the best authority) the following (R. 45).

"At the institution of the league fifty permanent

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"sachemships were created, with appropriate names; "and in the sachems who held these titles were vested "the supreme powers of the confederacy. To secure order "in the succession, and to determine the individuals en- "titled, the sachemships were made hereditary, under "limited and peculiar laws of descent. The sachems "themselves were equal in rank and authority, and instead "of holding separate territorial jurisdictions, their powers "were joint, and co-extensive with the league. As a "safeguard against contention and fraud, each sachem "was 'raised up' and invested with his title by a "council of all the sachems, with suitable forms "and ceremonies. Until this ceremony of confirma- "tion or investiture, no one could become a ruler. He "received, when raised up, the name of the sachemship "itself, as in the case of titles of nobility, and so "also did his successors, from generation to generation. "The sachemships were distributed unequally between "the five nations, but without thereby giving to either "a preponderance of political power. Nine of them were "assigned to the Mohawk nation, nine to the Oneida, four- "teen the Onondaga, ten to the Cayuga and eight to the "Seneca. The sachems, united, formed the council of "the League, the ruling body, in which resided the exec- "utive, legislative and judicial authority. It thus ap- "pears that the government of the Iroquois was an "oliarchy, taking the term, at least, in the literal sense, "'the rule of the few;' and while more system is ob- "servable in this than in the oligarchies of antiquity, it "seems also better calculated, in its framework, to resist "political changes.

"This specimen of Indian legislation is so remarkable "that a table of these sachemships, with their division "into classes, indicating certain inter-relations, hereafter "to be explained, is inserted in the Seneca dialect."

Then follows a list of fifty-one sachems. Second on the list is Hiawat-ha of the Turtles of the Mohawks.

"These titles or names were hereditary in the several "tribes of which each nation was composed. When an "individual was made a sachem, upon the death or de- "position of one of the fifty, his name was 'taken away' "and the name of the sachemship held by his predeces- "sors was conferred upon him. Thus, upon the demise "of the Seneca sachem, who held the title Ga-ne-o-di-yo, "a successor would be raised up from the Turtle tribe, in "which the sachemship was hereditary, and after the "ceremony of investiture the person would be known "among the Iroquois only under the name of Ga-ne-o- "di-yo. These fifty titles, excepting two, have been held "by as many sachems, in succession, as generations have "passed away since the formation of the League.

"The Onondaga nation, being situated in a central posi- "tion, were made the keepers both of the Council Brand "and of the Wampum, in which the structure and prin- "ciples of their government, and their laws and treaties, "were recorded. At stated periods, usually in the "autumn of each year, the sachems of the League as- "sembled in council at Onondaga, which was in effect "the seat of government, to legislate for the common "welfare. Exigencies of a public or domestic character "often led to the summoning of this council at extra- "ordinary seasons, but the place was not confined to "Onondaga. It could be appointed in the territory of "either of the nations, under established usages. Origi- "nally the subject of the general council was to raise up "sachems to fill vacancies. In the course of time, as "their intercourse with foreign nations became more im- "portant, it assumed the charge of all matters which con- "cerned the League. It declared war and made peace, "sent and received embassies, entered into treaties of "alliance, regulated the affairs of subjugated nations, re-

"ceived new members into the League, extended its pro-
"tection over feeble tribes, in a word, took all needful
"measures to promote their prosperity and enlarge their
"dominion.

"Notwithstanding the equality of rights, privileges and
"powers between the members of this body of sachems,
"there were certain discriminations between them which
"rendered some more dignified than others. The strongest
"illustration is found in the Onondaga sachem, To-do-
"da-ho, who has always been regarded as the most noble
"sachem of the League. As an acknowledgment of his
"eminence, two of the Onondaga sachems were assigned
"to him as hereditary councillors.

"At the establishment of the League, an Onondaga by
"the name of To-do-da-ho had rendered himself a potent
"ruler, by the force of his military achievements. Tra-
"dition says that he had conquered the Cayugas and the
"Senecas. It represents his head as covered with tangled
"serpents, and his look, when angry, as so terrible, that
"whoever looked upon him fell dead. It relates, that
"when the League was formed, the snakes were combed
"out of his hair by a Mohawk sachem, who was hence
"named Ha-yo-went-ha, 'the man who combs.' To-do-da-
"ho was reluctant to consent to the new order of things,
"as he would thereby be shorn of his absolute power, and
"be placed among a number of equals. To remove these
"objections in some measure, and to commemorate his
"magnanimity, the first sachemship was named after him,
"and was dignified above the others by special marks of
"honor; but such, however, as were in perfect consis-
"tency with an equal distribution of powers among all
"the sachems as a body. Down to the present day,
"among the Iroquois, this name is the personification of
"heroism, of forecast, and of dignity of character; and
"this title has ever been regarded as more illustrious than
"any other, in the catalogue of Iroquois nobility.

"To several other of these officers or names, particular "duties were affixed at the institution of the League. "For example: The Senecas were made the door- "keepers of the Long House; and having imposed upon "Do-ne-ho-ga-weh, the eighth sachem, the duty of watch- "ing the door, they gave to him a sub-sachem, or assist- "ant, to enable him to execute this trust. This sub- "sachem was raised up at the same time with his superior, "with the same forms and ceremonies, and received the "name or title which was created simultaneously with "that of the sachemship. It was his duty to stand behind "the sachem on all public occasions and to act as his "runner or attendant, as well as in the capacity of a "counsellor. Ho-no-we-na-to, the Onondaga sachem who "was made the keeper of the wampum, had also a sub- "sachem, or assistant. Several other sachems, to whom "special responsibilities were confided, were allowed sub- "sachems, to enable them to fulfill their duties, or per- "haps as a mark of honor. All of these special marks "of distinction were consistent with perfect equality "among the sachems, as members of one ruling body, in "the administration of the affairs of the League. When "their method of legislating is considered, this fact will "appear with greater distinctness.

"The laws explained at different stages of the cere- "monial, were repeated from strings of wampum into "which they 'had been talked' at the time of their en- "actment. In the Indian method of expressing the idea, "the string, or the belt can tell, by means of an inter- "preter, the exact law or transaction of which it was "made, at the time, the sole evidence. It operates upon "the principle of association, and thus seeks to give "fidelity to the memory. These strings and belts were "the only visible records of the Iroquois; and were of no "use except by the aid of those special personages who

"could draw forth the secret records locked up in their "remembrance.

"It is worthy of note, that but little importance was "attached to a promise or assurance of a foreign power, "unless belts or strings were given to preserve it in recol- "lection. Verbal propositions, or those not confirmed by "wampum, were not considered worthy of special preser- "vation. As the laws and usages of the Confederacy were "intrusted to the guardianship of such strings, one of the "Onondaga sachems, Ho-no-we-na-to, was constituted "'Keeper of the Wampum,' and was required to be versed "in its interpretation."

The wampum records being exhibited to the court, the plaintiffs read from the first volume of Clark's "History of Onondaga County," published in 1849, it being admitted that Mr. Clark was dead (R. 51), the following:

"Os-sa hin-ta, Captain Frost—This distinguished chief "of the Onondagas, who presided with great ability over "the councils of the nations from 1830 to 1846, possessed "a character and a name, which eminently deserves to be "remembered. He was a cousin of the celebrated Oun- "diaga, and a nephew of Kawictoda. He was distin- "guished for the nobleness of his character, the peculiar "fervidness of his eloquence, and his unimpeachable in- "tegrity—qualities which secured for him the unlimited "confidence of his nation. His most distinguished asso- "ciates have been Oh-he-nu (Captain Hannos), Oh-ka-a- "yunkg (Onondaga Peter), Ka-ha-yent (Captain Joseph), "O-gha-ta-kak (Captain Joseph 2d), *De-hat-ka-tons* (*Abram "La Fort*), *and Ut-ha-wah* (*Captain Cold*). *This latter*

"*for a long time was keeper of the council fire of the Six* "*Nations.*"

"The ancient Council-Fire of the Confederate Nations, "from time immemorial, had always been kept alive at "Onondaga, the Central nation of the Confederacy. "After their alliance with the English in 1665, the fires "of the United Councils of the two powers were kindled "at Albany, and there, according to the figurative man- "ner of Indian expression, was planted the great tree, to "which was fastened the chain of friendship. With "the close of the great council of 1775, that fire, which "had so long kept burning, was extinguished. It "was the last Indian council held at the ancient Dutch "capital. The great Council-Fire of the Six Nations was "was still kept alive at Onondaga till after the close of "the revolutinary war, at which time a portion of the "Onondagas took up their abode on the Buffalo Creek "Reservation, under the protection of the Senecas, and "there was established the Council-Fire of the Six Na- "tions. The Council-Fire was kept by Ut-ha-wah (Capt. "Cold), an Onondaga, and the Senecas appropriated a "mile square of land on their reservation, as a mark of "distinction to the chief who kept it. Efforts have often "been made by the Onondagas at home, to have the "council-fire restored to its ancient hearth, but always "without success until the Fall of 1847. The Onondagas "and Senecas on the Buffalo Reservation, seeing that "their lands were like to pass from them, and thereby "their removal become inevitable, after the death of Capt. "Cold, resolved to restore the sacred deposit to its ancient "site.

"We would here remind the reader that what is termed "the council-fire, is not, as is by many supposed, an "actual fire, kept constantly burning, but the place where "their national records are kept, and belts, the memorials "of treaties, deposited and preserved, and as such, the

" term is only used in a figurative sense. It is the place " where all the national councils assemble, and where is " retained the spirit and essence of their ceremonies and " institutions. Important Indian councils are often held " without actual fire.

" De-hat-ka-tons was at this time chosen keeper of the " council-fire of the Six Nations. *These archives consist " of various belts of wampum, some twenty-five or thirty " in number, which the author has had the satisfaction " of seeing (a sight rarely allowed a white man), with " explanations from the keeper. Here is shown a belt, " sixteen inches broad, by four feet long, representing " the first union and league of the Five Nations, and is " called the 'Carpet' foundation or platform, or as we " may better understand it, the constitution; literally, " something to stand upon.*"

" *The several nations are distinguished by particular " squares, and these are joined together bg a line of " white wampum, and united to a heart in the centre, " implying the union of hand and heart as one. In " connection with this is a second belt having the figures " of several chiefs wrought in the wampum, all holding " hand in a circle, which is to represent that there shall " be no end to this league.*"

" *On one end is figured the Long House, the great " Cabin which no new nation can enter until it has " erected some little cabins around it; that is, the nation " must perform some deeds worthy of note before it can " be entitled to admission to the Great League in the " Federation. Around this are five smaller cabins, " emblems of the original Five Nations, before the league " was formed, and on one side is a still smaller one, " wrought since the first, representiug the Tuscarora " Nation, which was admitted at a subsequent period. " Another long narrow belt having a cross at one end and " a long house at the other, a narrow white stripe con-*

" necting the long house and a large cross, was explained " as follows: 'Great many years ago,' a company " from Canada presented this belt, desiring that mis- " sionaries, from the Roman Catholic Church, might be " settled among the Five Nations, and erect a church at " Onondaga, and that the road should be continually " kept open and free between them."

" All the other belts were explained with particular " minuteness."

" The bag which contains these relics is of itself a " singular curiosity. It is made of the finest shreds of " elm bark, and a person without being apprised might " easily mistake it for the softest flax. Its capacity " would exceed a bushel. This bag is reputed to be as " old as the league itself, and certainly bears the marks " of great antiquity."

" The tubes or beads of wampum are of red, dark blue, " pale blue, black and white colors, made of conch shell. " They are about five-eighths of an inch long, about as " large as a small pipe-stem, and hollow, strung, woven " and wrought with sinews of deer and bark.

" The whole, to say the least, is a great curiosity, and " has undoubtedly been handed down from a remote " period. It is held as a sacred treasure, preserved " with great care, and looked upon with peculiar rever- " ence."

The court sustained the defendant's objection to the admission of the parts in italics and admitted the rest.

GENERAL JOHN S. CLARK

(the best living authority.)

In 1879 John S. Clark, the best living authority, saw the wampums in the possession of Thomas Webster, whom he was told was wampum-keeper, and photographed them. They were eleven in number, and they were "read" to him (R. 55–61). The pictures of his photographs facing pages 56 and 57 show that four of them were these wampums.

BAPTISTE THOMAS, *a chief of the Onondagas and treasurer of the nation.*

He says that he has known the eleven wampums, photographed by General Clark, for forty or fifty years, in the possession of the successive wampum-keepers (continuing the list given by Mr. Joshua V. H. Clark in his history) (R. 144–145).

GENERAL CARRINGTON

(who bought the wampums of Thomas Webster.)

He was employed to make the New York Indian part of the United States Census of 1890, and his report, *which*

was put in evidence by the defendant, and dated January, 1892, contains the following:

Extracts from Special Bulletin (Ex. A and 1.)

[Title] (R. 89–114)

"ELEVENTH CENSUS OF THE UNITED STATES.
"ROBERT P. PORTER,
"Superintendent.

"EXTRA CENSUS BULLETIN

INDIANS.

"The Six Nations of New York.
"Cayugas, Mohawks, Saint Regis, Oneidas, Onondagas, Senecas, Tuscaroras."

(Exhibit A and 1 (Census Report), page 447 (fols. 265, *et seq.*).

"THE SIX NATIONS OF NEW YORK: The story of the "Five, afterward Six, Nations, or, more properly, the "league of the Iroquois, no matter how or when told, "never loses its interest. The uncertainty and doubt sur- "rounding most North American Indian history are par- "tially removed from the Six Nations. They of all "American Indians have best preserved their traditions. "Besides, their system was so complete and their govern- "ment so unique and so well fitted to the people that "from the earliest European arrival they have been con- "stantly written about. Their small numbers, compared "with the enormous country they occupied and the gov- "ernment they originated, with their deeds of daring, will "always excite surprise. Their league, tribal and indi- "vidual characteristics, and personal strength of will, "together with their great courage and prowess, account

"for their success in war and the methods which brought
"comfort in peace.

"The Six Nations are to American Indian life what the
"Greeks and Romans in ancient history were to the
"nations bordering on the Mediterranean. Their general-
"ship in war was of the highest, their civilization and
"cultivation, for their surroundings, the most advanced,
"and their economies of life the most applicable and fit of
"all the American race within the present boundaries of
"the United States and Canada.

"They made war or peace with equal facility, holding
"with a death-grasp to their old ideas and traditions,
"conquering and absorbing tribes, and getting the control
"and government of the country from the new Carolinas
"on the south to the lakes on the north and the Missis-
"sippi on the west. The Mohawk war-whoop was the
"terror of aboriginal life, and the signal-fires of the
"Iroquois league, illuminating the hills and valleys of the
"Atlantic coast, meant danger to the outlaying tribes.

"Their phenomenal fighting capacity, coupled with the
"rapidity of movement and power of concentration of
"their fighting men, gave the impression of a vast number
"of warriors. It can be stated with almost a certainty
"that the league of the Iroquois since the advent of the
"European on the American continent and up to 1680
"never exceeded 15,000 persons, and it never had an
"available fighting force of more than 2,500 men; and
"the astonishing fact is presented by the census of 1890
"and the statistics of non-resident Iroquois tribes that
"the league of the Iroquois is stronger in 1890 than it was
"in 1660, when first estimated by competent Europeans.
"In 1660 it was estimated at 11,000; in 1890 it is 15,970.

"Reports of late years as to the condition of the Six
"Nations of New York have been contradictory, and
"many of them were evidently manufactured and given
"out by interested parties when legislation to affect those

" Indians was pending. *Considering the fact that no cor-*
" *rect census embracing their actual condition had ever*
" *been made up to 1890, great care was taken in laying*
" *out the details of the work for a census and in selecting*
" *the agents to execute it.*"

Page 2 of Ex. I and A; page 448 of C. R.:

"The struggle now within the Six Nations for control
" of their government lies between the pagan and christian
" elements, and, in addition, they have to war with the
" wiles of the white man. Official corruption has been
" noted in the past among those high in authority, but
" this is now being rapidly remedied. The Six Nations
" are in most danger from without. The pagans, as used
" here (meaning the old party), are those holding to the
" faith of their fathers and opposing the white man and
" his methods. The christian element means those who
" accept christianity as a doctrine. As far as personal
" morals and the daily life of most of these people are con-
" cerned, the difference is merely technical, and consists
" in definition, the word of a pagan being considered
" as good as that of a christian, and, in the view that
" the state has nothing to do with one's profession of
" creed, among the Indians a self-reliant pagan is pre-
" ferable to a dependent christian. In the League of the
" Iroquois the largest liberty of the person consistent
" with the safety of the league is permitted. From per-
" sonal independence and sense of manhood many of the
" Iroquois have never departed. The reservation Indians
" of the west are the reverse of this. They look upon the
" nation and the great father as providers and dispensers
" of food and clothing, and lean heavily upom them and
" the public treasury. The Six Nations of New York
" have generally asked the great father, the Congress,
" and the New York legislature to let them severally
" alone. *They have been in a measure let alone by the*

'*authorities, and the result is that they are self-sus-*
'*taining and much further advanced in civilization*
'*than any other reservation Indians in the United*
'*States, and as much so as an average number of white*
'*people in many localities.* They have borne the bur-
'dens of peace with equanimity, and met the demands
'of the war for the Union with patriotism and vigor.
'Envious Caucasians, hungering for the Indians' landed
'possessions in New York state, as elsewhere, have been
'active and earnest in efforts to absorb their sustenance.
'They have been kept from doing so thus far through
'the efforts of earnest and active fair-minded people,
'who have prevented their spoliation. The Six Nations
'have been charged with being pagans, heathens, and
'bad citizens generally, but investigation shows the
'latter charge to be false."

Page 3 of Ex. 1 & A; page 449 of C. R.: (R. 92.)

"*The law and facts show that the reservations of the*
'*Six Nations of New York, are each independent, and*
'*in some particulars as much sovereignties, by treaty*
'*and obligation, as are the several States of the United*
'*States.* The St. Regis reservation, however, differs
'somewhat from the others. The lands within these
'reservations, of course, partake of and carry with them
'the conditions of the grant. *These nations are anom-*
'*alies, and, with the exception of the Five Civilized*
'*Tribes in Indian Territory, who are each known by*
'*treaty as nations, are the only ones of like character in*
'*the United States.* They are in fact almost nations
'within a nation. They were created and grew more out
'of fear of the Indian, and the desire to get rid of and keep
'him at peace at any price, than as an act of justice. In
'Indian territory they are embarrassing to the National
'Government, and an eyesore to the people who desire to
'live there. In New York they are a wonder to the

"curious, and the expectant haven of hope to many "speculators.

"The end of the century will probably see the so-called "nations in Indian territory absorbed or dispersed, and a "marked change in the present Indian nations in New "York.

"The incidents of the enumeration of the Seneca nation "showed a strong desire on the part of the advanced por- "tion to break away from old-time ideas and to keep "abreast with their white neighbors. The entire re-organiz- "ation of the Iroquois Agricultural Society was a step for- "ward. A more important indication in the same direction "was that of the Spring election in May, 1891, when nearly "every person elected was able to speak and read the "English language, and embraced among their number "men of property and progressive tendencies."

"*The members of the Six Nations of New York resid-* "*ing on reservations or living in tribal relations, do not* "*vote at county or state elections, nor do they pay taxes* "*to the counties or the state. They are, therefore, Indians* "*not taxed. They have a constitution, and the Senecas* "*have a charter from New York as well as their own.* "*They are amenable to national and state courts or* "*laws only in respect of crimes,* except the Saint Regis "Indians, hereinafter noted.

"*If the Iroquois, native or foreign-born, want to be-* "*come citizens of the United States, they must renounce* "*allegiance to their own people; but if those of the Six* "*Nations in New York become such citizens they can-* "*not carry their real property interest with them so that* "*it will be subject to levy and sale for debt on contracts.* "*This, in fact, is at present a practical inhibition in* "*their way to citizenship. The several reservations be-* "*long to them (Saint Regis differs somewhat from the* "*others), and neither the State of New York nor the* "*United States can legally break them up without the*

"*Indians' Consent, or through conditions analogous*
"*to those of war. They have always been recognized*
"*as nations.*"

Page 4 of Ex. 1 & A; page 450 of C. R.: (R. 94.)

"*The conclusion is irresistible that the Six Nations are*
"*nations by treaty and law, and have long since been*
"*recognized as such by the United States and the State*
"*of New York, and an enlightened public will surely*
"*hesitate before proceeding to divest these people of long*
"*established rights without their consent—rights recog-*
"*nized and confirmed in some cases by the immortal*
"*Washington and by more than a hundred years of pre-*
"*cedents and legislation.*"

"PEACEMAKER COURTS: The peacemaker courts are "peculiar to the Seneca Indians of New York. They "exercise probate jurisdiction and jurisdiction over minor "offenses. Appeal may be taken to the council of the "Seneca nation proper on the Allegany and Cattaraugus "reservations, and to the separate council of the Tona-"wanda Senecas. The term of office of a peacemaker is "for three years, one being elected annually for each "reservation, but those of the Tonawanda band, as with "all its officers, have no official relation to the other "bands of Senecas.

"The president of the Seneca nation sits as judge upon "the impeachment of a peacemaker. Among the grounds "of impeachment is taking a bribe, or, by relationship "or otherwise, having interest in a case.

"Divorces, as well as probate matters, come before this "court."

Page 19 of Ex. 1 & A; page 461 of C. R.: (R. 95.)

"HISTORICAL OUTLINE."

"The retirement of the Indian westward within the "United States has been qualified by two historical

"factors. The first grew out of the unlimited and con-
"flicting sweep of British land grants, which involved
"subsequent conflicts of jurisdiction and corresponding
"compromises, the second was incidental to the passage
"of the ordinance of July 13, 1787, which organized the
"northwest territory. The first, especially in the adjust-
"ment of the claims of Massachusetts and New York, to
"the same lands, dealt with Indian titles and rights
"which neither party could wholly ignore. The white men
"had overlapped and practically surrounded certain inter-
"nal nations. *The United States followed the British*
"*precedent, recognizing the independent sovereignty of*
"*the five Nations* (a) *in New York, and the rival states*
"*of Massachusetts and New York made their adjust-*
"*ments upon the same general basis.*

"Unlike their less fortunate countrymen in the south-
"ern states the Five Nations inherited titles, which they
"fully maintained in spite of French invasion, compelling
"Great Britain to honor those titles in her settlement of
"issues with France. The French claim of discovery was
"not supplemented by one of conquest. The Iroquois
"confederacy successfully defended its ancestral homes
"against both Indian and civilized invaders, even before
"Plymouth and Yorktown were colonized or Hollanders
"occupied Manhattan Island. *At the establishment of*
"*the American republic the Five Nations were still too*
"*strong to be ruthlessly forced out of their surround-*
"*ings, and the sentiment of the American people, sup-*
"*ported by President Washington, completely sup-*
"*pressed any demonstration in that direction.* The
"campaign of General Sullivan was based upon hostile
"invasion by the Indians, and its settlement was treated
"as the end of a necessary war with contiguous states.

"(a) The Five Nations, or League of the Iroquois, became the Six Nations
"after 1713 by the admission of the Tuscarora Indians from North Carolina
"into the Union's confederacy."

"The ordinance of July 13, 1787, dealt with the Indian "upon the border, whose hunting range had no limit, and "whose home jurisdiction had no distinctive definition.

"The distinction between the early status of the New "York tribes and that of the western tribes is an import- "ant one in applying the facts obtained for the Eleventh "Census of the United States to the solution of the prob- "lem in future dealings with the Six Nations.

"*The Indians of New York, early recognized as an* "*independent body politic, too strong to be despised and* "*to be conciliated as allies against other enemies, have* "*been comparatively undisturbed by modern progress,* "*but which must inevitably resolve all purely tribal re-* "*lations into common citizenship. The pressure from* "*without has, in the main, been that of example and* "*ideas rather than that of force. The reduction of their* "*landed possessions and the modification of their gov-* "*ernmental forms and social usages have been matters* "*of negotiation, treaty, and friendly adjustment.* The "grant by King James I. of England to the Plymouth "colony, afterward known as Massachusetts, from the "Indian tribe of that name, and the grant of Charles II. "to the Duke of York covered in part the same lands, "involving questions similar to those which attend Vir- "ginia land grants, and all others which extended west- "ward to the Pacific Ocean at a time when the geo- "graphical status of lands 'westward' had no clear de- "scription.

"A brief reference to the substantial settlement of this "and other matters affecting the New York tribes is all "that is needed in this connection. *The numerous na-* "*tional treaties* and Acts of Congress *and other treaties* "*between the State of New York and the Six Nations,* "*which are matters of public record,* have been compiled "and published by the State of New York in a volume "entitled 'Report of special committee, appointed by the "assembly of 1888 to investigate the Indian problem of

"the State.' The documents occupy 320 pages, octavo "size. Additional printed matter of 804 pages embodies "the testimony taken by a special commission in prose- "cuting their inquiries, and an appendix to the volume "cites statutes and treaties which have historic relation "to the subject-matter."

Page 20 of Ex. 1 and A; page 462 of C. R.: (C. R. 97.)

"The tendency of attempted legislation and very pro- "nounced utterances from respectable sources have been "in the direction of an abrogation of all existing treaties, "with or without the consent of the Indians. All such "propositions will be confronted by a national judicial "negative, and no impatience with slow Indian develop- "ment can excuse the impairment of his substantial titles "and rights or the imposition of terms of conquest."

"ANTECEDENTS OF THE SIX NATIONS: It is impossible "to justly apply the tests of to-day without deference to "the antecedents of this people and that course of history "*which has perpetuated their independence*, while nearly "all of their contemporary tribes have diminished or dis- "appeared. The advent of the white man in the coloni- "zation of the Atlantic Coast was at a time when the "Iroquois confederacy of the Mohawk, Oneida, Onon- "daga, Cayuga, and Seneca nations had practically mas- "tered the Algonquin tribes, which in Canada, New "England, the middle colonies, and the west had long "girdled the New York tribes as a belt of fire. Unlike "the Algonquins, whose tribes had nothing to bind them "together but certain similar peculiarities of dialect and "jealousy of the Five Nations, the Iroquois (the Mo- "hawks, Oneidas, Onondagas, Cayugas, and Senecas) had "a constitutional bond of union, described by Lossing as "a 'barbaric republic, the Iroquois confederacy, existing "in the wilderness, simple, pure and powerful, with its "capital 100 miles from the sea, and unknown until

"Cartier sailed up the St. Lawrence, until Champlain "penetrated its forests, and Hudson discovered the beau- "tiful river that bears his name.'

" *The traditions of the formations of this league* " *are very old, systematic, and carefully preserved.* " The league was called Ko-no-shi-o-ni, the 'cabin build- "ers' or the 'long house,' of which the Mohawks held " the eastern and the Senecas the western door, with the " great council fire or federal capital among the Onon- "dagas. The words attributed to Hiawatha, 'the very " wise man,' mingled with much romantic story, are so " descriptive of the family peculiarities of the different " nations that they are worthy of notice in the briefest of " the two forms preserved among the people. The scene " of the conference was on the hill slope north of Onon- "daga lake, in the State of New York."

"The Words of Hiawatha.

" We have met, members of many nations, many of " you a great distance from home, to provide for our " common safety. To oppose those foes from the north " by tribes, and alone, would prove our destruction. We " must unite as a common band of brothers, and we shall " be safe.

" You Mohawks, sitting under the shadow of the great " trees, whose roots sink deep into the earth, and whose " branches spread over a vast country, shall be the first " nation, because you are warlike and mighty.

" You Oneidas, a people who recline your bodies " against the everlasting stone that cannot be moved, " shall be the second nation, because you give good " counsel.

" You Onondagas, who have you habitation at the " great mountain and are overshadowed by its crags, shall " be the third nation, because you are greatly gifted in " speech and mighty in war.

"And you Cayugas, whose habitation is in the dark "forest and whose home is everywhere, shall be the "fourth nation, because of your superior cunning in "hunting.

"And you Senecas, a people who live out in the open "country, and possess much wisdom, shall be the fifth "nation, because you understand the art of raising corn "and beans and making cabins.

"You five great and powerful nations must unite and "and have but one common interest, and no foe shall be "able to subdue us. If we unite, the 'Great Spirit' will "smile upon us. Brothers, these are the words of Hia-"watha. Let them sink deep into your hearts.

"In 1535, at the site of the future city of Montreal, "Carter made a vocabulary of Indian words, showing "that the Iroquois language was then spoken by the "Hurons, who were conquered or absorbed by the "Iroquois. The confederacy is held to have its origin "about this time. This league, purely aristocratic in "spirit, but republican and representative in form, was "not political, but chiefly for mutual defense. *The care-"fully preserved wampums of those early times will re-"ceive notice in another connection.* 'Each nation was "'distinct and independent as to domestice affairs,' "writes Lossing, 'but bound to the others by ties of "'honor and the general good.' Each had its principal "sachems or civil magistrates with subordinate officers, in "all 200, beside 50 with hereditary rights. These were "assigned as follows: To the Mohawks 9; to the Oneidas, "10; to the Onondagas, 14; to the Cayugas, 10, and to "the Senecas, 8. Each nation has subdivisions of "tribes or clans, such as Wolf, Bear, Turtle, Snipe, "Beaver, Deer, Hawk and Heron, 8 in all. The "insignia or totem (mark) of each was subsequently "placed upon treaties after the European style.

"These tribes or clans formed one of the closest "bonds of union among the confederated nations. In "effect, each tribe was divided in 5 parts, and one part was "located in each nation. The Mohawk Wolf regarded "the Seneca Wolf as his brother. Thus, if the nations "fell into collision it would have turned Bear against "Bear, Wolf against Wolf, brother against brother. "'The history of the Ho-de-no-sau-nee,' says Morgan, "'exhibits the wisdom of these organic provisions, for "'during the whole history of the league they never fell "' into anarchy nor verged upon dissolution from internal "'disorders. The whole race was woven into one great "'family of related household.' The 8 tribes were, "however, in two divisions of 4 each, the Wolf, Bear, "Beaver and Turtle forming one division, and the Deer, "Snipe, Heron and Hawk forming the other. Marriage "between members of the same division was nearly as "rigidly forbidden as between members of the same "tribe."

Page 21 of Ex. 1 & A.; page 363 of C. R.: (R. 101.)

"The league had a president with 6 advisers, and au- "thority to convene representatives of all tribes in cases "requiring concert of action. Merit was made the basis "and sole reward of office. Oh-to-da-ha, an aged On- "andagan, was the first president of the league. *The "mat upon which he sat is still preseverved with care, "and the buckskin threads upon which the shell and "stone beads were strung are still sound, presenting one "of the most beautiful relics of the history of the con- "federacy.*

"In the military department chiefs were elected for "special causes, nor did they hesitate in extreme cases "to depose the civil sachem to give greater force to bat- "tle action. The military service was not conscriptive, "but voluntary, although every man was subject to mili- "tary duty, and to shirk it brought disgrace.

" Most extraordinary of all, the matrons sat in council " with a substantial veto as to peace or war. ' With " these barbarians,' says the historian of New York, " ' woman was man's co-worker in legislation, a thing " ' yet unknown among civilized people.' Doctor Colden, " in his history of the five Nations, sagely suggests that " ' here we may with more certainty see the original " ' forms of government than in the most curious specula- " ' tion of the learned.' Such was their regard for the " rights of man that they would not enslave captives; " neither did they allow intermarriages among families " of the same clan. *This has been the prevailing law up* " *to the present time.*"

Page 24 of Ex. 1 and A.; page 465 of C. R.: (R. 102.)

" THE GOVERNOR TRYON MAP: The latter has historic " value from its description of the country of the Six " Nations, with part of the adjacent colonies, recogniz- " ing at the time the independent relations which they " sustained to Great Britain. The vast tract then con- " trolled by the Seneca Indians is clearly defined, and " the changes of 120 years appear more impressive when " the boundaries and condition of the present representa- " tives of the former Six Nations are brought into close " relation to the facts of to-day.

" AREAS OF THE SIX NATION RESERVATIONS IN NEW " YORK AND CORNPLANTER SENECA, IN PENNSYLVANIA.

	Acres.
" Onondaga	6,100.00
" Tonawanda	7,549.73
" Allegany	30,469.00
" Oil Spring	640.00
" Cattaraugus	21,680.00
" Tuscarora	6,249.00
" Saint Regis	14,640.00
" Cornplanter, in Pennsylvania	640.00
" Total	87,967.73

"The New York commission estimates the acreage of "the Onondaga reservation at 7,300. The Saint Regis, "with swamp land, is estimated at 15,280 acres.

"RESERVATION OF THE SIX NATIONS IN NEW YORK: "1890. The maps of the existing reservations, as defined "in 1890, locate each family, water course, and road, "developing, as if by accident, in the clustering of their "homes, the differences between those of each nation who "hold to the tradition of the father, and those who wel- "come the civilization and christianity of the white man.

"For a complete and full history of the original treaties "and authorities as to the legal status of the Six Nations "reservations in New York (beside the report of the New "York State commission herein referred to), see the "report prepared by Alice C. Fletcher in 1885 and a mono- "graph by Franklin B. Hough, of Lowville, New York, "on the Indian tribes of New York, both printed in Exec- "utive Document No. 95. Forty-eighth Congress, second "session, which are full and most valuable. The various "New York reports and especially that of the New York "commission, made in 1889, contain much of interest as to "the reservations of the Six Nations.

Page 25 of Ex. 1 & A.; page 466 of C. R. (R. 103):

"ONONDAGA RESERVATION: *An old wampum of 1608, "representing the Iroquois confederacy, has for its 'cen- "ter house,' to indicate the rank of the Onondagas, a "heart. On either side are joined two sister nations, "and although fewer in numbers at present than others, "the Onondagas are given the first place in illustration "of the Six Nations in 1890.*"

Page 33 of Ex. 1 & A., page 471 of C. R. (R. 104):

"ANCIENT AND MODERN GOVERNMENT, PROVISIONS "AND INCIDENTS:

"*The Iroquois league had its democratic and republi- "can elements, but the separate national governments*

"were essentially oligarchic. The only semblance of "written law was the wampum. It was the duty of the "'keeper of the wampums' to store all necessary facts in "his memory and associate them with the successive lines "and arrangements of the beads so that they could "readily be called to mind. At general councils the "wampums were produced, solemnly expounded, and "made reminders of history and duty.

"'Reading the wampums' became, therefore, a means "by which to perpetuate treaties, and the exchange "of wampums was an impressive occasion. Both "the Canadian and New York divisions of the Six "Nations retain as national heirlooms these evidences "of the chief facts in their natio..al life."

"THE ONONDAGAS RETAIN THE CUSTODY OF THE "WAMPUMS OF THE FIVE NATIONS AND THE 'KEEPER "OF THE WAMPUMS,' THOMAS WEBSTER, OF THE SNIPE "TRIBE, A CONSISTENT, THOROUGH PAGAN, IS THEIR "INTERPRETER" (R. 104).

"According to the Narrative of Indian Wars in New "England, the original wampum of the Iroquois, in "which the laws of the league were recorded, 'was made "'of spiral water shells, strung on deerskin strings or "'sinew and braided into belts or simply united into "'strings.' Mr. Hubbard describes the wampum as 'of "'two sorts, white and purple.' The white is worked "out of the inside of the great conch shell into the form "of a bead, and perforated to string on leather. The "purple is worked out of the inside of the mussel shell. "A single wampum representing the Onondagas by a "heart, in the centre of the league, and older than the set-"tlement by the white people, or, as claimed, dating back "to Champlain's invasion in 1608, contains over 6,000 "white and purple beads made of shell or bone. ANOTHER "OF LATER DATE, 6 FEET IN LENGTH AND 15 STRINGS WIDE, "AND CONTAINING 10,000 BEADS, REPRESENTS THE FIRST

" TREATY BETWEEN THE LEAGUE AND THE United States.
" IN THE CENTRE IS A BUILDING REPRESENTING THE NEW
" CAPITOL. ON EACH SIDE IS A FIGURE REPRESENTING
" WASHINGTON AND THE PRESIDENT OF THE LEAGUE,
" WHILE, HAND IN HAND, THE THIRTEEN COLONIES OR
" STATES, ON ONE SIDE SEVEN AND ON THE OTHER SIDE
" SIX, IN ALL FIFTEEN FIGURES, COMPLETE THE MEMORIAL
" RECORD. *The mat on which the president of the league*
" *(Ta-do-da ho) is supposed to have sat when the league*
" *was instituted, about the middle of the sixteenth cen-*
" *tury, and the suspended mat to keep off the dust, are*
" *still in good preservation. One mongrum represents the*
" *continuation of peace with seven Canadian tribes who*
" *had been visited by the Jesuits, having a cross for each*
" *tribe, and with a zigzag line below, to indicate that their*
" *ways had been crooked, but would ever after be as sound*
" *as the Cross. Still another memorial of days of craft*
" *and treachery, while the league was too feeble to take*
" *the field against the Algonquin tribes represents a*
" *guarded gate, with a long, white path leading to the*
" *inner gate, where the Five Nations are grouped, with*
" *the Onondagas in the centre and a safe council house*
" *behind all. There are eleven of these historic mongrums,*
" *each fraught with traditional story of persons and*
" *events.*

" DANIEL LAFORTE, WHO HAS BEEN CHOSEN AS
" PRESIDENT OF THE LEAGUE, AND ALSO OF THE ONONDA-
" GAS, AND ELSEWHERE REFERRED TO, HOLDS UNDER HIS
" THE WAMPUM, AS REPRESENTED BY THOMAS WESTON,
" " ARE GOVERNMENT ENOUGH FOR THE NATIONS, AND LAY
" " DOWN ALL THE RULES OF DUTY THEY ARE BOUND."

" *The fact that the people can have no key to their own*
" *laws, and that the dictum of the mongrum reader is*
" *binding just as his memory or interpretation of the*
" *emblem shall dictate, seems to weigh little with the*
" *pagan party. Notwithstanding the claims made that*

" the wampums can be read as a governing code of " law, it is evident that they are simply monumental " reminders of preserved traditions, without any " literal details whatever. As curious relics they are " valuable. Photographs of all the wampums were " obtained to accompany the report of the Six Nations " Indians, with the explanation of each as read by the " wampum keeper. The mat of the to-do-da ho and the " wing (mat) used by the headsman to shield him from " the dust while presiding at the council are well pre- " served. The first group, from left to right, repre- " sents a convention of the Six Nations at the adoption " of the Tuscaroras into the league; the second, the Five " Nations, upon 7 strands, illustrates a treaty with 7 " Canadian tribes before the year 1600; the third signi- " fies the guarded approach of strangers to council of " the Five Nations; the fourth represents a treaty when " but 4 of the Six Nations were represented; and the " fifth embodies the pledge of 7 Canadian 'Christian- " ized' nations to abandon their crooked ways and keep " an honest peace. Above this group is another, claiming " to bear date about 1608, when Champlain joined the " Algonquins against the Iroquois. The second group " includes, also in the center, the official memorial of the " organization of the Iroquois confederacy, relating back " to about the middle of the sixteenth century, and im- " mediately over that of 1608, suspended between the " 'turtle rattles,' which were used at the feather dance " at Cattaraugus January 21, 1891, is a ragged wampum " of unknown antiquity. ABOVE, AND CONTAINING THE " GENERAL GROUP, IS THE WAMPUM MEMORIAL OF THE " FIRST TREATY MADE BY WASHINGTON ON BEHALF OF THE " 13 ORIGINAL STATES AND PRESIDENT OF THE SIX NATIONS " AT THE NATIONAL CAPITAL.

(R. 107.)

"GOVERNMENT AND EXISTING CONDITION OF THE RESERVATIONS:

"To give a clear view of the government and present "condition of the reservations, they will be noticed in the "order already adopted.

"*The Onondaga Nation is governed by 27 chiefs* "all but 2 being of the pagan party; 2, however, are "sons of christian ministers, and others professed for a "time to be christians, but quietly rejoined old associa- "tions. Albert Cusick, lay reader in the Church of the "Good Shepherd, held the office of to-do-da-ho (presi- "dent) at one time, but was deposed on account of his "religion. Those who have thus resumed their former "political and social relations are among the most per- "sistent in opposing a change. Daniel LaForte, a genial "man in his own house, and once active in church work, "is one of this number. It is, nevertheless, true that "many of the most influential, whose property is gaining "in value and whose business gradually increases their "dependence upon the white people for a market and "like benefits, realize that their own interests would be "more secure under some recognized code of law for the "government of the nation.

"*The ruling chiefs, chosen by the females of the fami-* "*lies represented, as in very ancient times, are practi-* "*cally in office for life.* In case of a vacancy the suc- "cessor chosen may be under age."

Page 36 of Ex. 1 and A; not in C. R. (R. 108):

"It would be almost impossible for any community of "white persons, whether of a high or low social grade, "whether educated or ignorant, to live in peace under "the loose restraints which the Six Nations call their "governmental system, and yet there are very few disor- "ders, few crimes, and petty offenses against person or

"property are very infrequent. Pride in the old systems "of the confederacy and in the traditions and memories "of early times have much to do with the involuntary "respect paid to the chiefs, sachems or councillors, who "are officially recognized as their government by the re- "spective nations; but natural indolence or indifference "to the future, provided the immediate present be toler- "able has its effect, and suspicion that the white people "urge citizenship upon them for the purpose of a more "ready control of their lands prevents decided action "toward citizenship."

Page 37 of Ex. 1 & A; page 473 of C. R. (R. 108):

"The names of the present chiefs" (Onondaga, R. 108) "are as follows, those marked with a x being unable "to read or write: x Thomas Webster (Snipe), age 64; x "John Green (Wolf), 74; x Asa Wheelbarrow (Eel), 64; "Charles Green, 30; x William Hill, 52; John Hill, 56; "x Peter George (Eel), 38; John R. Farmer, 28; x James "Thomas, 42; George Vanevery (Snipe), 36; x Frank "Logan (Wolf), 35; William Lyon (Turtle), 50; x Bil- "lings Webster, 31; Daniel LaForte (Wolf), 58; x George "Crow (Wolf), 34; x Baptist Thomas (Turtle), 64; x "Abbott Jones, 76; x Charles Lyon, 57; x Andrew "Gibson (Beaver), 29; x Wilson Reuben (Beaver), 50; "Jacob Scanandoah (Beaver), 70; x George Lyon (Eel), "42; x Levi Webster, 35; Hewlett Jacobs (Eel), 48; "Jacob Bigbear (Turtle); John Thomas (Turtle), 30; "Enoch Scanandoah, 24."

Page 39 of Ex. 1 & A; page 474 of C. R. (R. 109):

"*The Tuscarora Indians were admitted to the Iro-* "*quois league on the ground of a common generic ori-* "*gin, retaining their own hereditary chiefs, but without* "*enlarging the original framework of the confederacy.* "They had authority to be represented and enjoy a nom- "inal equality in the councils. They are styled 'sons,'

"and in turn use the term 'fathers' in their official rela-
"tions with the league. No authority exists by which
"they can be disturbed by the league in the management
"of their own affairs. The prevalent opinion to the con-
"trary is an error. In the Revolutionary war and in the
"war of 1812 they were faithful to the white people, and
"in the war of the rebellion furnished a reasonable con-
"tingent of volunteers to the union cause.

"*Vacancies among the chiefs are filled by the women*
"*of the clans entitled to the appointment.* Here, as
"among the Onondaga and Tonawanda bands, the ruling
"chiefs arrogate and occasionally exercise the power of
"displacing chiefs by formal deposition, or make the
"place so uncomfortable as to force a resignation. It is
"a stretch of prerogative to exercise this power except
"for a cause that would require a substantial impeach-
"ment, but there is no method of redress, and the Indian
"dislike to bother about local legislation, even in their
"own behalf, represses organized effort to find a remedy."

Page 39 of Ex. 1 & A.; page 475 of C. R. (R. 109):

"The Saint Regis Indians formed part of the Seven
"Nations of Canada. In 1852 their numbers were 1,100,
"or nearly the present number of the American Saint
"Regis Indians. By a provision of the first constitution
"of New York, adopted April 26, 1777, no purchases or
"contracts for the sale of lands by the Indians since the
"14th day of October, 1775, were to be valid unless made
"with the consent of the legislature. Among the docu-
"ments in the possession of the nation at the present time
"none are more prized than the treaty made May 4, 1797,
"exemplified, signed and sealed by John Jay, Governor,
"February 28, 1800."

Page 40, Ex. 1 & A; page 475 of C. R. (R. 110):

"The peculiar credit which the Six Nations attach to
"all preserved treaties, however old or superseded, de-

" veloped during the census year a new departure in the " Saint Regis plan of self-government. The old or pagan " element among the Onondagas, supported by Chief " Daniel La Forte, *Thomas Williams, keeper of the* " *wampum*, and others, maintained that their rights to " lands in Kansas and similar rights rested upon *treaties* " *made between the Six Nations (exactly six) and the* " *United States, and at a general council, held in 1888,* " *the Saint Regis Indians were formally recognized as* " *the successors of the Mohawks, thus restoring the* " *original five, while with the Tuscaroras, maintaining* " *six.* The theory was that an apparent lapse from the " six in number would in some way work to their preju- " dice. The same elements at once proposed the revival " of the old government by chiefs, which had become ob- " solete among the Saint Regis Indians. A meeting was " held, even among the Cattaraugus Senecas, with the de- " liberate purpose to ignore or abandon their civilized, " legal organization as the Seneca nation and return to " former systems. The impracticability of such a retro- " gade movement did not silence the advocates for chief- " ship for the Saint Regis Indians. *The election through* " *families, after the old method, of 9 chiefs and 9 al-* " *ternate or vice chiefs was held, and these were duly* " *installed in office by a general council, representing* " *all the other nations.* Practically and legally they " have no power whatever."

Page 61 of Ex. 1 & A; not in C. R. (R. 111):

" Wampum associations must be exchanged for written " law, and irresponsible chiefs must be held to strict ac- " count under intelligent codes, voluntarily adopted, " under the sanction of the State, or by the interposition " of the State in behalf of the people, who have no power " to protect themselves."

Page 78 of Ex. 1 & A; page 496, C. R. (R. 111):

"The very names contrasted with those of other reser-
"vations, Webster, Hill, Thomas, Brown, Jones, Jacobs,
"and Lyons being English. Old John Adams, of the
"war of 1812, Abraham Hill, the honored Oneida chief,
"and *Chief Theodore (Thomas) Webster, keeper of the*
"*wampum*, bore their years with dignity, and were
"among the most interested of those present."

Page 79 of Ex. 1 & A; not in C. R. (R. 111):

"*The alleged absurdity of the Six Nations of New*
"*York (being a nation within a nation) does not change*
"*the fact or nullify the sequence of actual history.* This
"very fact opens to the Indian and to the white man a
"way of relief, without the impairment of treaties or the
"disregard of any rights whatever.

"*Accepting all that the most technical advocate of the*
"*Indians' claim to prolonged independence can advance,*
"a higher and equally consistent principle of inter-
"national law supplies the wholesome remedy.

"As contiguous nations must have political intercourse,
"and upon a basis of mutual benefit, so there must be,
"on the part of each, some representative authority to
"adjust conflicting issues between them. The absence of
"such authority, and the neglect or refusal of any people
"to place themselves within the range of mutual con-
"sideration of the rights of the citizens of both, is among
"all nations a *casus belli*. The remedy may not require
"arms, but a constraint equivalent to that of arms when
"actual rupture occurs is legitimate."

Page 80 of Ex. 1 & A, not in C. R. (R. 112):

"THE TITLES TO INDIAN LANDS: Independent of the
"pre-emption lien of the Ogden Land Company upon
"the lands of the Seneca nation, and absolutely as respects
"the Onondaga, Tonawanda, and Tuscarora Senecas, the

" Indians already hold their lands substantially in " severalty. The theory advanced by many that these " lands are so absolutely held in common that the people " have no stimulus to improve them is founded upon an " erroneous idea of law and fact. The same principle " that underlies the English and therefore the American " common law obtains here. It has been settled among " the Six Nations beyond question that occupation, build- " ing upon, and improvement of land by consent of the " authorities representing the whole people confer a title, " practically in fee simple, excepting that it is inalien- " able to a foreigner; but it may be conveyed or devised " within the nation, and that it is inheritable by the " immediate and natural heirs in absence of a will, " and that as a system, however crude in form, the dis- " tribution of land in case of death almost invariably " follows its natural and just direction. The exceptions " are not greater than in contests among the white " people.

" It is equally true that when a party without land " applies to the authorities for the formal allotment of " land for improvement and cultivation permission to so " select and improve land is almost always given. The " national title has itself been a guarantee to each in- " dividual occupant that this perfect title in the nation " is his to control as if he held a deed therefor, and that " his use and disposal of said land cannot be disturbed. " It is also true that there is public domain enough on " each reservation to give every family seeking it all the " land needed, and that the disinclination to work, to " improve land, and secure support therefrom is the only " barrier to a rightful possession and use of said land. It " is also a fact that this tenure is so fully recognized that " no body of chiefs or ruling representatives of the Six " Nations dare assert any right to disturb that tenure or " prevent its sale or devise by the tenant, and that every

"case, so far as known reported as a violation of this "right by the peacemaker courts or by other authority "upon the settlement of an estate or dispute as to ad- "joining boundaries or conflicting titles, has been adjusted "upon evidence, and not upon any assumption that the "title was disposable at the choice of said court or chiefs. "The judges and chiefs on each reservation unequivocally "disclaim such alleged authority, and any assertion of "the right would be ignored or resisted. Neither is there "any existing usage, method, or power by which an "assumption of authority so sweeping could be enforced."

Page 81 of Exibit 1 and A, not in C. R. (R. 113):

"THE NATURAL DISTRIBUTION.—The claim by some "that the land of the Six Nations shall be divided per "capita or per stirpes, in severalty, is a form of commun- "ism, ignoring all the just equivalent of honest industry "and asserting a prerogative of authority over the prop- "erty and fruitful labor that no government in contact "with the civilized world at present would dare assert, "much less attempt to exercise.

"There is not the faintest similarity between Indian "occupation of any western reservation and the titles of "the Six Nations to their lands. The United States and "the State of New York, without anticipating the para- "mount authority of the federal courts, have the physical "power to ignore treaties and contracts for which an ade- "quate consideration has been paid; but nothing less than "a casus belli, when all treaties end with conflict and "might, establishes its false code of right in a new adjust- "ment of relations between the parties, can furnish an "excuse for such legislation."

Then he has in the report a picture, which is in the Record, facing page 103. This picture is expressed to represent the "officers of the League of the Iroquois of "the United States," and the portraits of three of them are given who are thus described:

"Daniel La Forte (Ha-You-Ws-Esh), 'Intestine Bruiser,'
"Chairman of League and acting To-do-da-ho, Wolf Tribe,
"Onondaga.

"THOMAS WEBSTER
"(Ha-yah-du-gih-wah), 'Bitter Body,'
"KEEPER OF THE WAMPUM,
"Snipe Tribe, Onondaga.

"Jarvis Pierce (Jah-dah-dieh), 'Sailing uncle,' Clerk
"of Six Nations, Onondaga.

All this, of course, was in 1890.

General Carrington was a witness for the defendant in this case, and gave the following testimony (R. 73):

Q. Did you visit the Onondaga Nation or Tribe? A. At the Onondagas I found no relics of value until I called with President La Forte upon Thomas Webster to verify references made to him as the possessor of wampums. It was twice or three times of calling before the old man would show me the wampums——

"Q. When you say the 'old man,' you refer to Thomas
"Webster? A. Yes, sir; I was at the time occupying
"the house of Chief La Forte with my secretary. I told
"him of my inquiries made elsewhere and he said that he
"would secure me access to Webster's collection; that
"some of them he had a good many years, and he claimed

"that upon examining them he could read the ancient "history of the Six Nations. He said, 'Perhaps he "will spare you one or two. No one has any interest in "them now except himself, and he keeps them as relics "of old times.' He went to Webster and brought an old "valise, very dilapidated, and tied with a rope, which had "been under his bed, and we examined the wampums "together. A large number of beads were loose, and "he gave what, as far as he could, was his idea of "the original meaning of the wampums. I impressed "upon him as well as I could the importance of their "being safely preserved somewhere and that if he chose "to have me take charge of them, or of any of them, I "would guarantee that, either at Washington or else-"where, in some safe place, they would be carefully and "permanently preserved. After some reluctance he con-"sented to come into Syracuse and bring the valise and "give me permission to have photographs taken."

Mr. Paige: This is Webster? A. Webster.

"(Witness continuing) I did this so that in case he de-"clined to sell any to the Government I would at least "preserve the appearance of them. He entrusted me with "the valise, returned to the Reservation. I had them "photographed and returned them to him."

Mr. Paige: Is the picture, to face page 33 of the Bulletin, entitled "Historic Wampums — Six Nations," a copy of those photographs? A. The photographs in Bulletin, opposite page 33, entitled "Historic Wampums—Six Nations," are prints from those plates.

Q. And they include all of the wampums that he had? A. Yes, sir; that is all the wampums that were in the valise.

Q. That engraving represents all the wampums that were in the valise? A. Yes, sir.

Q. And one of them is pictured twice, being the lower one on the lower right-hand picture? A. Yes, sir.

"(Witness continuing) (fol. 222) Shortly after Chief La "Forte told me that Webster would dispose of a portion "of them; he was afraid that they would be lost or "stolen and he would bring them over and talk with me "about them. No funds had been placed at my disposal "by the Government——

"MR. DELEHANTY (interrupting): By the Government? "A. Yes; by the Government, but all expenses and pur- "chases were reported to Washington for allowance or "disallowance and payment. Mr. Webster at the time "was very poor, anxious for a horse and wagon, and told "me to take four or five of the wampums, and see what I "I could give him for them. The thirteen figures was the "wampum that seemed to me——"

"(Witness continuing) At that time I had no funds of "my own available, but felt confident that the expense "was within my instructions and would be allowed, and "I agreed to pay him as soon as I could get to Syracuse "and return $75.00, which he and the chief said he needed "to secure his horse and wagon outfit."

"MR. DELEHANTY:

"Did you give him the money? A. I paid him the "$75.00, and took his receipt.

"Q. You paid Webster the $75.00? A. Yes; in the "presence of Daniel La Forte, who witnessed his signa- "ture to the receipt.

"Q. Witnessed the signature on the receipt given to "you by Webster for the money? A. Yes, sir.

"Q. (Showing witness paper) Is that the signature of "Daniel La Forte on the receipt? A. Yes, sir.

"Q. Is that the mark of Thomas Webster? A. Yes, sir.

"*Mr. Delehanty:* I offer the receipt in evidence.

"The receipt is marked by the stenographer Exhibit "'B.'

"Mr. Paige reads the said receipt as follows:

"Received from
"seventy-five dollars, $75.00.

his
"THOMAS x WEBSTER.
mark.

"Witness,
"DANIEL LA FORTE.

"Written at the top are the words and figures: "'Syracuse, N. Y., Feb. 10, 1891,' which Gen. Car- "rington says he wrote in this morning.

"Witness: Yes, sir.

"MR. DELEHANTY:

"Q. The receipt reads; 'Received from "'$75.00.' "Will you explain why the person or body "from whom the money was received was left blank? A. "It was left blank until I could receive response from "Washington as to whether the purchase would be recog- "nized as an official purchase or only be treated as a per- "sonal purchase.

"Q. Did you ever receive any authority to have it recog- "nized as an official purchase? A. I did not; it was dis- "allowed. I was instructed to make any purchase if I "thought it best for the public care, but the government "would not refund me.

"Q. How long did you remain at the home of Daniel "La Forte on that occasion? A. I couldn't tell within "several weeks.

"Q. Several weeks? A. I forget whether it was six "or seven weeks; nearly two months.

"Q. During that time, or any other time, did Daniel "La Forte say to you that Thomas Webster held any "official position as wampum-keeper, or otherwise? A.

"No; Mr. Webster called himself wampum-keeper "because he was the only man that had the wampums "and kept them, and so cherishing the tradition as "wampum-keeper, and I treated him in my report "as wampum-keeper, but I did not know him officially "as such. Daniel La Forte treated Webster as tradition "treats a person who collects postage stamps and such "things, and as such is the possessor of national or family "association.

"Q. Did La Forte say to you that the Onondaga tribe "or nation was the owner of any these wampums? A. "He did not, and no Indian in Onondaga (and I saw "most of them) claimed that anybody but Webster had "absolute control of them. It never was true nor pre-"tended.

"Q. Did you at any time throughout your investiga-"tions, either in reply to any inquiries made by you "or otherwise, hear any Indian of the Six Nations make "any statement to the effect that the wampums were "anything else but curiosities or relics, or had at the "present time any other significance? A. Yes, sir. "Quite a good many of the Indians felt that Webster's "reading of them was not altogether fanciful but had "its historical value, and they were very glad that they "were going to be saved and kept somewhere and not "lost. It was said that Webster really seemed to have "second-sight and seemed to see things through those "wampums that others did not see—seemed to see "historical significance.

"Q. That is what La Forte said? A. Yes, Webster "seemed to see historical antecedents in these wampums.

"Q. That is what La Forte said? A. Yes, sir. In "other words, Webster's looking upon these wampums "was not considered merely a curious inspection but that "there was a history of a people involved in them, and "he seemed to get grotesque things out of them.

"Q. Did either Webster or La Forte say anything to "you in regard to where he had obtained those wam- "pums—this collection of wampums? A. Well, I think "in regard to one or two, I asked him how long—

"Q. (Interrupting) You say you asked La Forte how "long he had them? A. Yes, and he asked Webster and "my impression is that he had one or two of them for "quite a number of years, I don't know but he still, it "seems to me, as long ago as his father's time—his "father had them; that's my impression. One or two of "them he brought from Canada.

"Q. He also stated he brought them from Canada? "A. He got them in Canada.

"Q. Did he say he brought or bought them in Canada? "A. He got them in Canada.

"Q. One or two he got in Canada? A. Yes, sir.

"Q. Did he say whom he got those which he got in "Canada from? A. No. In dealing with Mr. Webster "and securing the wampums it will appear from my re- "port that I endeavored to give as much significance as "possible to those wampums in his father's hands for "the sake of verifying the general history of the Six "Nations.

"(folio 238.) Q. In your report you also state that they, "referring to the wampums, are simply monumental "reminders of preserved tradition without any literal "details whatever; as curios, and relics, they are valu- "able; will you state what you refer by that expression "—what do you mean by that expression? A. I mean "just what it says. The words "literal details" are not "by what I have said before about cryptic expressions.

"Q. In the affidavit which you notified on the applica- "tion for the appointment of a Receiver, which I have "here in my hands, you say that nobody among the "tribes, or any of them, so far as you were able to learn,

"disputed Webster's individual ownership of the wam-
"pums, is that a fact? A. I never heard it disputed.

"Q. And you say—you assert—that no one beyond
"Webster had any wampums, or claimed any right to
"any? A. That is true, no one other than Webster
"claimed right to the wampums held by him."

JOHN W. SANBORN,

a witness for the defendant, and who negotiated the sale of the wampums by Dr. Crane to the defendant, representing to Dr. Crane that he was selling them to the State of New York,

speaking of a time two years and a half after 1891, he says (R. 120):

"Are you able to say, from your knowledge and obser-
"vation and study of the affairs of these Indians, whether
"there is any such thing in existence at the present time
"as the Ho-de-no-sau-nee? A. From the information
"that I gathered among Indians there is only a misty fig-
"ment of it.

"Q. Did you ever see an Indian other than Webster
"and Buck who claimed that these wampum belts had
"any authority among the Indians, or that they were de-
"pended upon for their history or record? A. Webster
"told me——

"Q. Other than Webster? A. Indians, many of them,
"have stated on my inquiring, hat these were not
"authoritative any more; that they had changed their
"form of government.

"Q. Do you know whether or not the different Indian
"tribes here have changed their form of government to

"comply with the Indian law of the State, having a con-
"stitution and by-laws the same as are authorized under
"the law? A. The Senecas, both the Cattaraugus and
"Alleghany Senecas have one government, a republican
"form of government, patterned after ours. For the last—
"as I understand it—ten to twelve years, the Onondagas
"have been struggling into the same form of government.
"As to the other tribes the ancient form of government
"has never been abandoned; some of them are in a some-
"what chaotic state, the Onondagas in particular. Well,
"Daniel La Forte, whose Indian name is Te-hes-ha, stated
"to me these were relics now, sort of heirlooms, like old
"spinning wheels, old almanacs, &c. That was the state-
"ment he made to me. Thomas Webster said—— When
"I asked Webster to read these, explain the belts to me,
"I asked him if they were authoritative, and he said:
"'No; our people don't care anything about them any
"more; we don't use them.'"

On his cross-examination he said (R. 138):

"You said that the Onondagas were struggling to adopt
"some other form of government than their ancient style
"of government. Do you understand that the govern-
"ment is otherwise than by chief, as it has always been?
"A. It is by chiefs, and yet they have been attempting to
"introduce modern methods.

"Q. The government is still by chiefs, so far as you
"know? A. They have been making an effort——

"Q. Is the government by chiefs? Does anybody but
"a chief have any voice in the government, so far as you
"know? A. In the latter government they have——

Q. "Does anybody except the chief have any voice in
"the government of the Onondagas, so far as you know?
"A. Evidently not.

"Q. The chiefs are appointed as they always have
"been, are not they, so far as you know? A. They

"have adopted a constitution which is different from the "old form.

"Q. So far as you know, are the chiefs appointed as "they always have been? A. Not entirely.

"Q. What is the difference? A. They have adopted a "constitution—twelve to fourteen years ago.

"Q. Anything in the constitution about the appoint- "ment of chiefs? A. Yes, sir; there is an attempt to "cut loose from the old form of government.

"Q. Is there anything in the constitution about the "way the chiefs shall be appointed? A. I don't recall; "I haven't it with me; I have a copy of it at home.

"Q. But you don't recall? A. Not precisely.

"Q. If it is not in the constitution, is the chief appointed "in any other way than as he always has been? A. I "don't consider that they have——

"Q. Will you please answer my question? So far as "you know, if there is nothing in the constitution about "the appointment of chiefs, are chiefs appointed by the "Onondagas as they always have been? A. Not en- "tirely as they always have been.

"Q. What is the difference? A. The difference is, "within a few years they adopted a different form of "constitution.

"Q. Is that all the answer you have to my question? A. "I think that is all; yes, sir. If I had a copy of the "constitution here I could make it clearer."

The Constitution.

Well, we put in the constitution (R. 150). All the changes it makes are to provide for a president, secre-

tary, treasurer and marshal and to make eight chiefs a quorum in the Council, and Baptiste Thomas swears, and nobody contradicts him, that the chiefs are appointed just as they always were (R. 145).

Daniel LaFort.

Daniel LaFort's statement taken *ex parte* by Mr. Sanborn on the 30th of August, 1897, is put in evidence by the defendant (R. 125).

He begins by saying that he is "President of the Six "Nations of New York State Indians."

So that it is plain on the defendant's own showing, that the Six Nations still existed *on the thirtieth of August, 1897.*

He then says that he is "President of the Onondaga Nation."

So that it is plain, on the defendant's own showing, that the Onondaga Nation still existed *on the thirtieth of August, 1897.*

The only other thing in the statement bearing upon these matters is this (R. 126):

"The demand which Mrs. Converse makes (a copy of "which is hereto annexed) of the wampum belts de-"scribed in the letter (a copy of which is hereto annexed) "cannot be made on behalf of the Ho-de-no-sau-nee, for "the Ho de-no-sau-nee is the name given to the League "of the Six Nations (meaning the Long House). When "the Seneca Nation adopted a municipal form of govern-"ment a few years ago its connection with the League "ceased, and its interest in the wampum ceased also."

This of course shows that if the Senecas have dropped out of the League the other Five Nations are still going on with it—and of course the name of Ho-de-no sau-nee belongs as well to the League now as it did when it originally consisted of but five Nations.

Daniel LaFort signs himself to this statement as "President of the Six Nations of N. Y. State Indians, "and also President of the Onondaga Nation" (R. 127).

New York's Recognition of the existence of the Onondagas and the Six Nations.

At the last of the twentieth volume of Johnson's Reports are reported the judgments of the Court of Errors of New York of February, 1823. They are three in number, and in each case the Court speaks by Chancellor Kent, and they are his *last judicial* opinions. In one of them, *Goodell* v. *Jackson*, 20 J. R., 693, he said (p. 709): "The "*Oneidas* and the other tribes composing the Six Nations "of *Indians*, were, originally, free and independent "nations. It is for the counsel, who contend that they "have now ceased to be a distinct people, and become "completely incorporated with us, and clothed with all "the rights, and bound to all the duties of citizens, to "point out the precise time when that event took place. "I have not been able to designate the period, or to dis- "cover the requisite evidence of such an entire and total "revolution. Do our laws, even at this day, allow these "*Indians* to participate equally with us, in our civil and "political privileges? Do they vote at our elections, or "are they represented in our legislature, or have they any "concern, as jurors or magistrates in the administration "of justice? Are they, on the other hand, charged with "the duties and burthens of citizens? Do they pay taxes, "or serve in the militia, or are they required to take a "share in any of the details of our local institutions? Do

"we interfere with the disposition, or descent, or tenure "of their property, as between themselves? Do we prove "their wills, or grant letters of administration upon their "intestate's estates? Do our *Sunday* laws, our school "laws, our poor laws, our laws concerning infants and "apprentices, or concerning idiots, lunaties, or habitual "drunkards, apply to them? Are they subject to our "laws, or the laws of the *United States*, against high "treason; and do we treat and punish them as traitors, "instead of public enemies, when they make war upon "us? Are they subject to our laws of marriage and di- "vorce, and would we sustain a criminal prosecution for "bigamy, if they should change their wives or husbands, "at their own pleasure, and according to their own cus- "toms, and contract new matrimonial alliances? I appre- "hend, that every one of these questions must be an- "swered in the negative, and that on all these points they "are regarded as dependent allies, and alien communities. "It was, therefore, with some degree of surprise, that I "observed the Supreme Court laying down the doctrine "in this case, that these *Indians* of the six nations were "as completely the subjects of our laws as any of our own "citizens? In my view of the subject, they have never "been regarded as citizens or members of our body politic, "within the contemplation of the constitution. They have "always been, and are still considered by our laws as de- "pendent tribes, governed by their own usages and chiefs, "but placed under our protection, and subject to our "coercion, so far as the public safety required it, and no "further.

"The five nations once formed the fiercest and most "formidable confederacy of *Indian* republics ever known "in *North America:* and by their prowess and enterprise, "they held distant tribes of *Indians* under dominion and "tribute."

(p. 711.) "We have purchased the greater part of their "lands, destroyed their hunting grounds, subdued the "wilderness around them, overwhelmed them with our "population, and gradually abridged their native indepen- "dence. Still, however, they are permitted to exist as "distinct nations, and we continue to treat with their "sachems in a national capacity, and as being the lawful "representatives of their tribes."

(p. 711). "One community may be bound to another "by a very unequal alliance, and still be a sovereign state. "Though a weak state, in order to provide for its safety, "should place itself under the protection of a more "powerful one, yet, according to *Vattel*, (B. 1, ch. 1, s. 5 "and 6.) if it reserves to itself the right of governing its "own body, it ought to be considered an independent "state. There are several kinds of commission, says the "same jurist. (B. 1, ch. 16, s. 194.) The submission may "leave the inferior nation a part of the sovereignty, re- "straining it only in certain parts, or it may totally "abolish it, or the lesser may be incorporated with the "greater power, so as to form one single state, in which "all the citizens will have equal privileges. Now, it is "very apparent from our whole history, that the submis- "sion of the Six Nations has been of the former kind and "that, as an inferior nation, they were only restrained of "their sovereignty in certain respects. Though born "within our territorial limits, the *Indians* are considered "as born under the dominion of their tribes. They are "not our subjects, born within the purview of the law, "because they are not born in obedience to us. They be- "long, by birth, to their own tribes, and these tribes are "placed under our protection, and dependent upon us; "but still we recognise them as national communities."

Then, after citing a quantity of treaties made with the United States, he says (p. 715):

"It would seem to me to be almost idle to contend, in "the face of such provisions, that these *Indians* were citi- "zens or subjects of the United States and not alien and "sovereign tribes."

New York Statutes.

"THE INDIAN LAW."

Chapter 679 of the Laws of 1892, Volume 2, p. 1573.

"ARTICLE II.

"THE ONONDAGA TRIBE."

"§ 22. CUTTING AND REMOVING TIMBER.—No person "other than an Onondaga Indian shall cut or remove, "from the Onondaga reservation any tree, timber, wood, "bark or poles and no Indian shall cut any tree, timber, "wood, bark or poles for the purpose of sale or removal "from such reservation, nor shall sell, remove, cause to "be removed or aid in the removal from such reservation "of any trees, timber, wood, bark or poles, *except upon* "*the written permission of a majority of the chiefs of* "*the Onondaga tribe*, particularly specifying the quan- "tity and kind of trees, timber, wood, bark or poles to "be cut or removed."

"§ 24. LEASES.—An Indian residing on the Onondaga "reservation and a member of the Onondaga tribe, own- "ing or possessed of improved lands thereon may lease "such lands to white persons, for a term not to exceed "ten years; but no individual Indian shall have the right "to lease any lands used as a stone quarry. *A majority* "*of the chiefs of such tribe* may, by a written contract

" to be drawn under the direction of the agent of such " tribe and approved by his endorsement thereon, lease " the stone quarries and *national* lands of the tribe, the " expense of such contracts to be paid by the persons to " whom the lands shall be leased. Any such contract " without the consent of the agent shall be void."

The Indian Law was amended in twenty-eight particulars by Chapter 229 of the laws of 1893; in one particular by Chapter 1689, the Laws of 1896; in six particulars by Chapter 642 of the Laws of 1898; in one particular by Chapter 315 of the Laws of 1899; in six particulars by Chapter 253 of the Laws of 1900, and in two particulars by Chapters 296 and 329 of the Laws of 1902, but the above sections were not changed and are still in force.

On the twenty-seventh March, 1899, the Legislature of New York passed an act which contained the following:

(1 Laws of New York, 1899, p. 305.)

" Chap. 153, Laws 1899.

" AN ACT to collect and preserve from loss or injury " any and all wampums which the Onondaga nation of " Indians, or its wampum keeper, or any of the Ho-de-no- " sau-nee, otherwise known as the Five Nations, or the " Six Nations, or the Iroquois, is entitled to possess."

" SECTION 1.—The university of the state of New York, " which was duly elected to the office of wampum-keeper " by the Onondaga nation, on February twenty-sixth, " eighteen hundred and ninety-eight, and which by unani- " mous action of its regents on March twenty-second, " eighteen hundred and ninety-eight, accepted such elec- " tion as authorized to do by law, and which accepted the " custody of the wampums as formally transferred to the " chancellor as part of the exercises *and with the unani-* " *mous approval, both of the election and transfer, by* " *the council of the Five Nations, held in the senate*

"*chamber of the capitol at Albany on June twenty-sec-*
"*ond, eighteen hundred and ninety-eight, by duly chosen*
"*representatives of all the original nations of the Ho-de-*
"*no-sau-nee*, shall hereafter be recognized in all courts
"and places, as having every power which has ever, at
"any time, been exercised by any wampum-keeper of
"the Onondaga Nation, or any of the Ho-de-no sau-nee,
"otherwise known as the Five Nations, or the Six Na-
"tions, or the Iroquois, and shall keep such wampums in
"a fire proof building, as public records, forever."

It is true that this act also contained the following:

"§ 2. The provisions of this act shall not apply to the
"subject matter of any litigation now pending in any
"court of this state."

and that at the time of its passage this action was pending.

The above is all the evidence on this matter.

FIFTH HEAD.—The Appointment of the University.

The evidence is as follows:

Upon the trial the plaintiffs offered in evidence what they claimed to be certain proceedings of the governing council of the Onondaga Nation,

These alleged proceedings are printed in full in the Record (R. 62).

and the following things then happened (R. 61):

Mr. Paige: * * *

"I will offer in evidence minutes of a Council held by
"the Onondagas on the 26th of February, 1898.

"You do not object on the ground that the signatures "are not proved?

"*Mr. Delehanty:* No, I will admit that is A GENUINE "DOCUMENT, *and the genuine signatures are there.*"

Capitals and italics mine.

This "genuine document" recites that "at a council of "the Onondaga Nation" in Onondaga, "held pursuant "to call and notice given to all the chiefs"—there were present twelve chiefs including the president, secretary and treasurer of the nation, and that the following resolution was unanimously adopted—

"*Resolved*, That the University of the State of New "York be and it is hereby elected wampum keeper of the "Onondaga Nation, *with full power and it shall be its* "DUTY *to* GET *possession of and safely keep* FOREVER all "wampums of the Onondaga Nation and the Five Nations "and Six Nations and each of them.

"Whereupon the University of the State of New York "was unanimously elected to the office of Wampum-"Keeper."

And it is further said to be *a true copy from the minutes.*

And then follow the "genuine" signatures of the twelve chiefs.

Capitals and italics mine.

Then followed this (R. 66):

Mr. Paige: * * * *

"I will put in from the record book of the Onondaga "Nation the Constitution with which the Nation is at "present governed. I will have a copy sent to the stenog-"rapher. That will be Ex. 8."

This constitution is printed (R. 150). It contains the following:

"2nd. The sachem chiefs shall be enrolled in the Book "of Records, which shall be kept by the Secretary of the

"Nation in each meeting of the chiefs; roll shall be called "by the secretary of the nation, *eight* of their number of "the chiefs shall constitute a Quorum for the transaction "of national business;"

There is not anything else of importance to this case in it except that it provides for the offices of President, Secretary Treasurer and Marshall, and defines their duties.

We then called Baptiste Thomas, the treasurer of the Nation, who testified that the number of the chiefs was about twenty-four (24) (R. 146), and that the chiefs were appointed in the same way that they always had been (R. 145).

We had already proved and the trial court has found that the Onondaga Nation was the official custodian (R. 30).

The above is ALL *the evidence.*

It is thus gravely admitted upon the record that at a regular council—being the sole governing body of the Onondaga Nation—the university was directed and it was made its "DUTY to get possession of and safely keep for-"ever all wampums."

It has just been said that (R. 62) at a council of the Onondaga nation held at the house of Daniel La Forte in Onondaga on the 26th day of February, 1898, held pursuant to call and notice given to all the chiefs, the following resolutions were unanimously adopted.

"*Resolved*, That the University of the State of New York "be and it hereby is elected wampum keeper of the Onon-"daga nation, *with full power and it shall be its duty to* "*get possession of and safely keep forever all wampums* "*of the Onondaga nation and the Five nations and Six* "*nations and each of them.*

"Whereupon the University of the State of New York "was unanimously elected to the office of wampum-"keeper."

At their March meeting of 1898, which was upon the twenty-second of March, the following was done by the Regents, as appears by their minutes (R. 182):

"STATE MUSEUM

"Wampum. The secretary reported the unanimous "election by the Indian council of chiefs, of the Univer- "sity as permanent wampum keeper for all wampums of "the Five nations and Six nations.

"*Voted*, That the matter be referred to the museum "committee with power to act in securing the wampums."

In June a Regents' convocation was held in Albany at which were present Indians of all the Six Nations, and by the direction of Onondaga chiefs I presented publicly to the Regents the above resolution of the chiefs—the original paper—and the wampums, and there was a public acceptance by the Chancellor in the following words:

"Chancellor Upson—As Chancellor of the University— "permit me to accept this gift" (R. 183).

(Regents' Bulletin 45, of December, 1898, p. 430.)

On the twenty-seventh March, 1899, the Legislature of New York passed an act which contained the following:

(1 Laws of New York, 1899, p. 305.)

"Chap. 153, Laws 1899.

"AN ACT to collect and preserve from loss or injury "any and all wampums which the Onondaga nation of "Indians, or its wampum keeper, or any of the Ho-de-no- "sau-nee, otherwise known as the Five Nations, or the "Six Nations, or the Iroquois, is entitled to possess."

"Section 1.—The university of the state of New York, "which was duly elected to the office of wampum-keeper "by the Onondaga nation, on February twenty-sixth, "eighteen hundred and ninety-eight, and which by unan- "imous action of its regents on March twenty-second,

"eighteen hundred and ninety-eight, accepted such elec-
"tion as authorized to do by law, and which accepted the
"custody of the wampums as formally transferred to the
"chancellor as part of the exercises *and with the unan-*
"*imous approval, both of the election and transfer, by*
"*the council of the Five Nations, held in the senate*
"*chamber of the capitol at Albany on June twenty-sec-*
"*ond, eighteen hundred and ninety-eight, by duly chosen*
"*representatives of all the original nations of the Ho-de-*
"*no-sau-nee*, shall hereafter be recognized in all courts
"and places, as having every power which has ever, at
"at any time, been exercised by any wampum-keeper of
"the Onondaga Nation, or any of the Ho-de-no-sau-nee,
"otherwise known as the Five Nations, or the Six Na-
"tions, or the Iroquois, and shall keep such wampums in
"a fire proof building, as public records, forever."

It is true that this act also contained the following:

"§ 2. The provisions of this act shall not apply to the
"subject matter of any litigation now pending in any
"court of this state."

and that at the time of its passage this action was pending.

SIXTH HEAD: The way the wampums came to the defendant.

On the 10th of February, 1891 (fol. 227) General Carrington, being then in charge of the Indian part of the United States census, bought these four wampums from

Thomas Webster, the "wampum keeper" (R. 77), for $75 (R. 76). In so doing he represented to Thomas Webster that he—Carrington—was acting for the United States government, and this was his own belief.

Of this there is no doubt—(R. 73–77). He says, "they "were very glad that they were going to be saved and "kept somewhere and not lost" (R. 77).

However, his purchase was disallowed by his superiors (R. 76–77)—and he afterwards sold the wampums to the reverend Doctor Crane of Boston.

In the spring of 1883, Mr. Sanborn—the same Mr. Sanborn who got the statement from Daniel LaFort—was employed by the New York Commissioners of the Columbian Exposition as director of the Indian Exhibit (R. 116, 133). What occurred as to the wampums he thus relates —(R. 116–117):

"It was necessary to read up such works and refer- "ences as I could find, in order to make plans for the "bark houses; the construction of them was committed "to me——

"Q. Without interrupting——we want to get at the "wampum belts? A. I desired in those houses an ex- "hibit of those wampum belts. Dr. Crane, whom I "knew, wrote me that he had these belts, that he bought "them of Gen. Carrington, who bought them of the In- "dians. *He suggested in his letter it would be a proper "thing for them to be within the bounds of New York "State, that they belonged within the bounds of New "York State properly.* I laid this matter before Senator "McNaughton, and he took me into Mr. Thatcher's of- "fice, which was in the next room, and laid the matter "before him. *Mr. Thatcher stated he could not very well "see how money could be taken from the appropriation "made by the State, and yet wished that the wampum "belts might be brought back to the State.* My idea was

"that the Commissioners should buy the wampum or ar-
"range for the purchase in some way. Mr. Thatcher and
"Senator McNaughton held a few moments' conference
"together—I din't hear what they said—and Mr.
"Thatcher handed me a check. He asked me first what
"the price was. I told him what Dr. Crane's price was,
"$500, and he handed me the check.

"Q. Is that the check which you refer to? (Handing
"witness paper.) A. Yes, sir.

"(Check marked Ex. B, F. J. M.)

"ALBANY, N. Y., March 24, 1893.

"Albany City National Bank pay to the order
"of Oliver Crane, Esq., in full payment for wam-
"pum belt, Five hundred dollars 00/100 $500 dol-
"lars. JOHN BOYD THATCHER.

"Endorsed as follows: Pay to the order of
"Mrs. Sibilla Bailey Crane.

OLIVER CRANE.

"Pay to the order of Henry Bailey, SIBYLLA
"BAILEY CRANE.
"HENRY BAILEY
"ANDREAS BLUMM. (Bank Stamps.)"

"John Boyd Thatcher."

"Q. You sent to Dr. Crane? A. He requested me to
"send it to Dr. Crane.

"Q. Did you receive the wampum belt from Dr. Crane?
"A. Yes, sir. They were in the Art Museum at Boston.
"Dr. Crane was at Winter Park, Florida. He sent an
"order to the curator of the Museum to ship them to me.

"Q. You received them? A. Yes, sir.

"Q. Took them to Chicago? A. Yes, sir. I should
"say to Albany first, to Mr. Thacher, turned them over
"to him.

"Q. Were they afterwards exhibited at the Chicago

" Exposition during the whole time of the Fair? A. " Yes, sir, I suppose during the whole time. They were " exhibited. I don't know when they were put on exhi- " bition; I presume at the commencement.

" Q. They are the same wampum belts here in Court? " A. Yes, sir, they are."

" And at R. 131:

" Mr. Thatcher then handed me this check and said, 'You attend to this and send for the wampum belts.'"

" Q. So that the wampum belts had not been received " by you or by anybody? A. Not at that time.

" Q. Not at the time he gave you the check? A. No, " sir; immediately after receiving Dr. Crane's letter Sen- " ator McNaughton asked me to go to Boston and exam- " ine those wampum belts to make sure they were au- " thentic, and that the statement concerning them was " authentic, and that they were there as described.

" Q. Where were they? A. In the Boston Art Mu- " seum, loaned by Dr. and Mrs. Crane.

" Q. This was after you got the check? A. No, sir.

" Q. When was it? A. After I received the letter " from Dr. Crane, describing the belts quite fully, and " suggesting they ought to be within the bounds of New " York State. The Senator asked me to go down there " and examine them, take their measurements, get an " accurate description of them.

" Q. You did? A. I did so.

" Q. Then what did you do? A. I returned and laid " before him a description of the belts which I made. It " was immediately after that that the check was drawn, " after I reported on the belts.

" Q. After you reported on them, and before they had " been received? A. Yes, sir.

" Q. I read what purports to be a copy of a letter writ- " ten by you to Doctor and Mrs. Crane:

"'WORLD'S FAIR.
"Office of
"JOHN WENTWORTH SANBORN,
"Director-in-Chief
of the
"INDIAN EXHIBIT OF THE STATE
"OF NEW YORK
"at the
"WORLD'S COLUMBIAN EXPOSITION.

"THE CAPITOL, Albany, N. Y.....189..
"Naples, N. Y., March 7, 1893.

"DEAR FRIENDS,
"DR. AND MRS. CRANE:

"The precious wampum came in good order on Sat-
"urday and will soon be shipped with our other curi-
"osities to Chicago, and will add very much to the in-
"terest of the N. Y. Indian Exhibit. I will see to it
"that the descriptions are in larger type, and printed in
"fine style, giving the history of the past and the recent
"history as well, so as to set forth all the interesting
"facts in connection with the wampum.

"I enclose a form of receipt which, on receipt of the
"money due you, you may if you please sign unless the
"Senator should make out a form. It will not be neces-
"sary to make two copies except for historical interest."

"Concerning my type-writer, I would say it is a Rem-
ington, No. 2, and works perfectly and rapidly.

"I am to have a picture of these wampums taken, and
"engraved for insertion in my History of the Six Nations,
"and I shall there give the history of it and make note of
"our purchase of it from you and Mrs. Crane. I am
"almost engulfed with work, but it is a pleasure to stop
"to write to you.

"Sincerely yours,
"JOHN W. SANBORN.

"P. S. I did not date the receipt. I will leave that
"to you to do when the money arrives.

"Yours,
"J. W. S."

"Q. Did you write that letter? A. Yes, sir.

"Enclosed in it, as I am informed, was a receipt, of "which I am informed the following is a copy.

"RECEIPT FOR WAMPUM.

"WORLD'S FAIR
"Office of
"JOHN WENTWORTH SANBORN,
"Director-in-Chief
"of the
"INDIAN EXHIBIT OF THE STATE
OF NEW YORK
"at the
"WORLD'S COLUMBIAN EXHIBITION.

THE CAPITOL, Albany, N. Y.....189..

"Received from Hon. Donald McNaughton, Chief "Executive Officer of the Board of General Managers of "the New York Exhibit at the World's Fair, and John "Wentworth Sanborn, Director-in-Chief of the New York "Indian Exhibit at the World's Fair, acting for the State "of New York, Five Hundred Dollars ($500.00) for one "case of four Wampum Belts, as follows, viz.: One Belt "of dark wampum beads, representing the Confederation "organization of the Five Nations under Hiawatha; One "Belt representing the First Treaty stipulation between "the Six Nations and General George Washington pic- "turing in Wampum beadwork the Council House, Gen- "eral Washington, the O-do-ta-ho, or President of the "tribes, and thirteen representatives of the Colonies; also "two fragments of other Belts, one representing the first "approach to the Indians of the 'People with white faces,' "and the other a narrow belt representing the unity of "the Five Nations."

"Did you enclose that receipt in that letter? A. Yes, sir." and R. 138:

"I supposed that on behalf of the Commissioners Mr. "Thatcher had authorized the purchase by the State."

As the wampums were received in Albany on the *fifth* March—see letter (R. 132—and the receipt expressing

that the money was received from "Hon. Donald Mc-"Naughton" and "John Wentworth Sanborn" "acting "for the State of New York" went to Doctor Crane on the *seventh* of March—see letter and receipt (R. 132–3) —and Mr. Thatcher did not make his cheque until the *twenty-fourth* of March—see cheque (R. 117—it is plain *that Doctor Crane sold the wampums under the belief that he was selling them to the State of New York.*

Section 4 of Chapter 236, Laws of New York, 1892 (1, p. 488), provided as follows:

"§ 4. The general managers of the State shall, immedi-"ately after their appointment, and upon the call of the "governor, meet at the capitol in the city of Albany, and "organize as a board by the election of a president and a "vice-president. Three members of the board shall be a "quorum for the transaction of business. The board may "make rules and regulations for its government, and for "the government of the district boards, and of the chief "executive officer. But such rules and regulations shall "not conflict with the provisions of the act of congress "hereinbefore referred to, or the regulations adopted "thereunder, or with the rules and regulations adopted by "the World's Columbian Commission."

Section seven provided that the "total expenditures "to be incurred under this act shall not exceed the sum "of three hundred thousand dollars"; and it appropri-ated three hundred thousand dollars to be paid "upon "the requisition of the board of general managers, signed "by its president and secretary, accompanied by estimates "of the expenses for the payment of which the money so "drawn is to be applied."

Chapter 188 of the Laws of 1893 (1, p. 317) appropri-ated three hundred thousand dollars more "for the pur-"pose of carrying into effect the provisions of said act"

" (Chap. 236, Laws 1892) and defraying the expenditures " thereunder,"—the monies to be drawn in the same way.

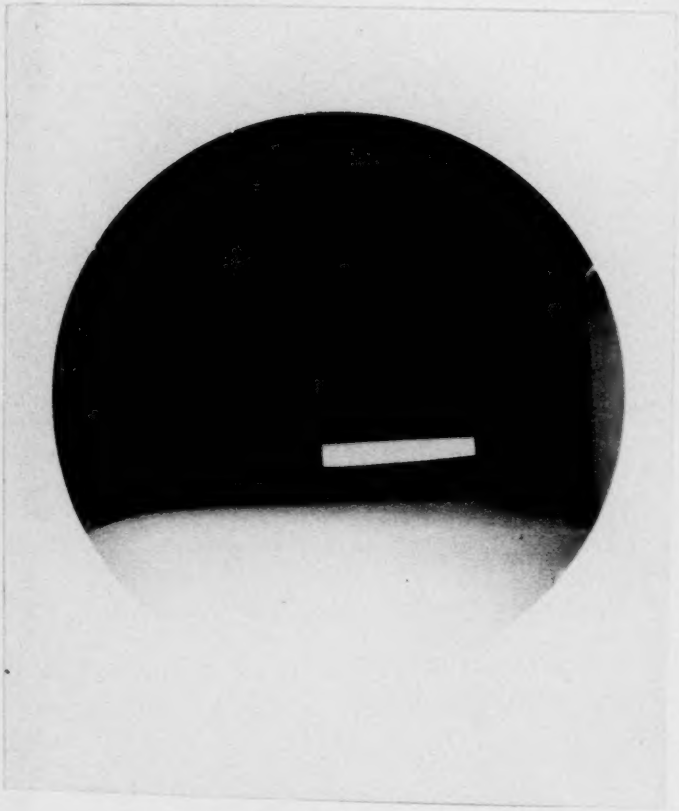
Chapter 497, Laws 1893 (1, p. 1076)—
Passed 29 April 1893.

" *Any property purchased* or provided *by the board of* " *general managers of the exhibit of the State of New* " *York at the World's Columbian Exposition*, or the " district commissioners of any judicial district of the " state, *for* use, *exhibit or display* in connection with the " exhibit from the State of New York at the World's " Columbian Exposition *and paid for from the appro-* " *priation provided by either* chapter two hundred and " thirty-six of the laws of eighteen hundred and ninety- " two, or chapter one hundred and eighty-eight laws of " eighteen hundred and ninety-three, may from time to " time, as may seem to said board best for the interests of " the state, be sold and disposed of by said board of gen- " eral managers."

Italics mine.

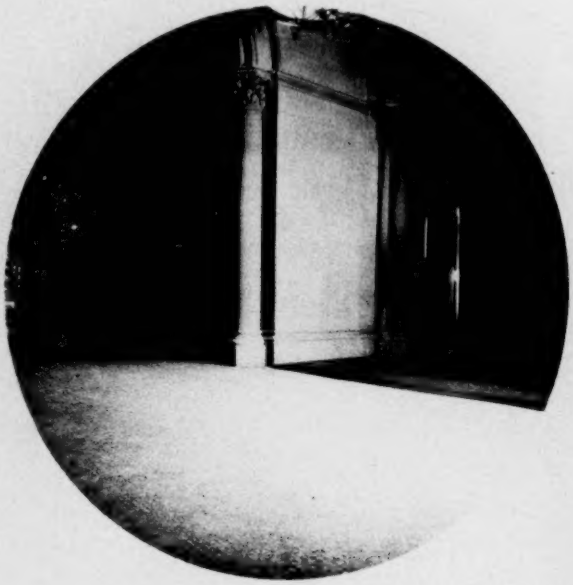
Mr. Thatcher had the spending of six hundred thousand dollars and he spent it all:—

and *it may be* that he could find it in his conscience to pay five thousand for the painting given opposite, although he could not find it in his conscience to pay five hundred dollars for the oldest records in North America, which as his own act shows, he believed to be well worth the money. This however, is not in the record.



JUNO RECEIVING.

The guides in the Capitol at Albany tell visitors that Mr. Thacher paid five thousand dollars for this picture.



SEVENTH HEAD: Facts as to the demand.

Mr. Thacher took the wampums to the Columbian Exposition and publicly exhibited them there as his own property—(see his letter (R. 15) and the report (R. 43–45).

Afterwards or on the nineteenth of December 1896, Mr. Dewey the Secretary of the University of the State of New York wrote to Mr. Thacher asking about the wampums (R. 22, 67). Mr. Thacher answered (21 December) asserting his own ownership in most unqualified terms (R. 4, 21). On the 23 December, Mr. Dewey wrote again (R. 22, 67), and Mr. Thacher replied—26 December—again asserting his own ownership (R. 5, 22, 65). Upon this Mr. Dewey wrote to him—18 January 1897—asking "to allow us to have them" (wampums) "by refunding what "you paid for 'them' (R. 24, 67). To this, so far as the record shows, there was no answer.

On the thirteenth day of July 1897, seven Onondaga chiefs—one less than a quorum (R. 150)—met at Onondaga and signed the paper printed at R. 152 authorizing Mrs. Converse to bring suit for the wampums—"and to use all "other means."

This was signed, among others, by Daniel LaFort, "President of the Six Nations of New York State Indians, "and also President of the Onondaga Nation" (R. 127).

Under this Mrs. Converse made the demand which is printed at R. 127—17th August, 1897—R. 126.

On the twenty-sixth of February 1898—the Council of the Onondaga Nation—twelve chiefs, one of whom was Daniel La Fort, being present—elected the University of the State of New York "wampum keeper" (R. 62)—Thomas Webster, whom we claim to have been the last preceding wampum keeper, having died the third of July, 1897 (R. 61).

By this election it was made the "duty" of the Uni-

versity of the State of New York "to get possession of "and safely keep forever all wampums of the Onondaga "nation and the Five Nations and Six Nations and each "of them" (R. 62).

And the twelve chiefs, of whom Daniel La Fort was one, made the University of the State of New York the attorney in fact of each of them and of the Onondaga Nation to recover the wampums by suit or otherwise "in the "name of the Onondaga nation or of any or all of the "sachems and chiefs undersigned either as such sachems "and chiefs or individually" (R. 63–64).

EIGHTH HEAD: Facts as to the Statute of Limitations.

Let us assume that the cause of action accrued when Webster sold, or attempted to sell, the wampums to General Carrington on the tenth of February, 1891.

Assuming also that Mr. Thacher can tack to his time the time of the possession of the wampums by General Carrington and Doctor Crane, and assuming that the action was begun when the new plaintiffs were brought in on the twentieth of December, 1898, the case stands this way:

Section 401 of the Code of Civil Procedure of New York contains the following: "Section 401. If, when "the cause of action accrues against a person, he is with-"out the state, the action may be commenced within the "time limited therefor, after his return into the state. "If, after a cause of action has accrued against a person, "he departs from the state and remains continuously "absent therefrom for the space of one year or more, or

"if, without the knowledge of the person entitled to "maintain the action, he resides within the state under "a false name, the time of his absence or of such resi- "dence within the state under such false name is not a "part of the time limited for the commencement of the "action."

The cause of action accrued against General Carrington tenth of February, 1891 (R. 76).

The action was begun twentieth of December, 1898 (R. 27).

Seven years, ten months, ten days.

7 y. 10 m. 10 d.

General Carrington left the State tenth of April 1891 and was out of it, except that he spent a week in Saratoga in July, 1892, until he delivered the wampums to Docter Crane. (Letters of 2 January 1899 and 16 March 1899 (fols. 254–259). He thus was out of the State continuously for more than a year. He went from Saratoga to Hyde Park and delivered the wampums to Doctor Crane. Doctor Crane resided in Boston and Florida until he died, and the cause of action against him arose when he was out of the State and he never came into the state afterwards. (Letters of 2 January 1899 and 16th of March 1899 (fols. 254–259).

Mr. Thacher's cheque is dated the 24th of March, 1893 (fol. 350), and it went to Dr. Crane in Florida (fol. 351). A cause of action could not therefore possibly have accrued

against Mr. Thacher until the twenty-fourth of March, 1893.

Deduct the time between the tenth of April 1891 when General Carrington left the state and the twenty-fourth of March, 1893 when a cause of action arose against Mr. Thacher. 1 y. 11 m. 14 d.

5 y. 10 m. 24 d.

Add seven days when General Carrington was in Saratoga..... 7 d.

31 d.

and the result is..... 5 y. 11 m. 1 d.

NINTH HEAD: Rulings as to evidence.

The trial court ruled out parts of what we offered from Clark's History of Onondaga County—which we claimed to be a general history of the Onondaga Nation—and we had shown that Clark was dead—but it admitted other parts. It admitted everything down to and including 1846—which did *not* include the names of the wampum keepers and the description of the wampums as Mr. Clark saw them in 1847. The parts ruled out are printed in *italics*. (R. 50–54).

BRIEF OF THE ARGUMENT.

I.

The political authorities of the Government recognising the national existence of the Six Nations and the Onondaga nation —all states must do so. The election or appointment by the Onondaga nation of the University of the State of New York as the depositary, or custodian, or keeper of the wampums was therefore valid and sufficient to enable it to sustain this action.

In the case of *The Kansas Indians* (5 Wall. 737), the head note contains the following:

"If the Tribal organization of Indian bands is recog-
"nized by the political department of the National gov-
"ernment as existing; that is to say, if the National gov-

"ernment makes treaties with, and has its Indian agent "among them, paying annuities, and dealing otherwise "with 'head men' in its behalf, *the fact that the primi-* "*tive habits and customs of the tribe, when in a savage* "*state, have been largely broken into by their intercourse* "*with the whites,—in the midst of whom, by the advance* "*of civilization, they have come to find themselves*—DOES "NOT AUTHORIZE A STATE GOVERNMENT TO REGARD THE "TRIBAL ORGANIZATION AS GONE, and the Indians as citi- "zens of the State where they are, and subject to its "laws."

Italics and capitals mine.

And the Court, speaking by Mr. Justice Davis, said (p. 756):

"The treaty of 1854 left the Shawnee people a united "tribe, with a declaration of their dependence on the "National government for protection and the vindication "of their rights. Ever since this their tribal organiza- "tion has remained as it was before. They have elective "chiefs and an elective council; meeting at stated "periods; keeping a record of their proceedings; with "powers regulated by custom; by which they punish "offences, adjust differences, and exercise a general over- "sight over the affairs of the Nation. This people have "their own customs and laws by which they are governed. "*Because some of those customs have been abandoned* "*owing to the proximity of their white neighbors*, may be "an evidence of the superior influence of our race, *but* "*does not tend to prove that their tribal organization is* "*not preserved.* There is no evidence in the record to "show that the Indians with separate estates have not "the same rights in the tribe as those whose estates are "held in common. Their machinery of government, "though simple, is adapted to their intelligence and "wants, and effective, with faithful agents to watch over

"them. If broken into, it is the natural result of Shaw-"nees and whites owning adjoining plantations, and living "and trafficking together as neighbors and friends."

And page 757:

"Conferring rights and privileges on these Indians can-"not affect their situation, *which can only be changed* "*by a treaty stipulation or a voluntary abandonment of* "*their tribal organization. As long as the United* "*States recognises their national character they are* "*under the protection of treaties and the laws of Con-*"*gress*, and their property is withdrawn from the opera-"tion of State laws."

Italics and capitals mine.

The New York Indians, 5 Wall. 761

(reversing *Fellows* v. *Denniston*, 23 N. Y. 420), was this:

An act was passed taxing lands occupied by the Senecas which, however, contained this proviso (p. 746)—"PRO-"VIDED, *That no sale for the purpose of collecting said* "*taxes shall in any manner affect the right of Indians* "*to occupy said lands.*"

The Court, speaking by Mr. Justice Nelson, said: (1866, p. 766)

"This last section furnishes, doubtless, a solution of "what we must otherwise regard as a very free, if not "extraordinary, exercise of power over these reservations "and the rights of the Indians, so long possessed and so "frequently guaranteed by treaties. These treaties are "historical and need not be referred to, beginning in 1784 "and coming down to 1842. That of 1794, entered into "at Canandaigua, New York, may be cited as a specimen. "Third article, 'The United States acknowledge all the "'land within the aforementioned boundaries (which in-"'clude the reservations in question) to be the property

" ' of the Seneca Nation, and the United States will never
" ' claim the same nor disturb the Seneca Nation * * *
" ' in free use and enjoyment thereof; but it shall remain
" ' theirs until they choose to sell the same to the people
" ' of the United States, who have the right to purchase,' "

(p. 768) " but the rights of the Indians do not depend
" on this or any other statutes of the State, but upon
" treaties which are the supreme law of the land; it is to
" these treaties we must look to ascertain the nature of
" these rights, and the extent of them."

(p. 770) " The tax imposed on the Buffalo reservation
" in 1840, 1841, 1842 and 1843, is not distinguishable from
" that imposed on the Alleghany and Cattaraugus reser-
" vations. The Indians were still in their ancient posses-
" sions and occupancy, and *till removed by the United*
" *States* were entitled to the undisturbed enjoyment of
" them."

(p. 771) " All agree that the Indian right of occupancy
" creates an indefeasible title to the reservations that may
" extend from generation to generation, *and will cease*
" *only by the dissolution of the tribe* or their consent
" to sell to the party possessed of the right of preemp-
" tion."

(p. 771) " Our conclusion is that the whole of the taxes
" assessed upon the three reservations (Buffalo Creek,
" Alleghany and Cattaraugus), are illegal and void, *as in*
" *conflict with the tribal rights of the Seneca* NATION *as*
" *guaranteed to it by treaties with the United States.*"

Italics and capitals mine.

In *United States* vs. *Holliday*, 3 Wall., 407, the Court, speaking by Mr. Justice Miller, said: (p. 419)

" The facts in this case certified up with the division of
" opinion, show distinctly that the Secretary of the
" Interior and the Commissioner of Indian Affairs have

" decided that it is necessary, in order to carry into effect " the provisions of the said treaty, that the tribal organi- " zation 'should be preserved.' In reference to all mat- " ters of this kind it is the rule of this Court to follow " the action of the executive and other political depart- " ments of the government, whose more especial duty it " is to determine such affairs. If by them those Indians " are recognized as a tribe, this Court must do the same. " If they are a tribe of Indians, then by the Constitution " of the United States, they are placed, for certain pur- " poses, within the control of the laws of Congress. This " control extends, as we have already shown, to the sub- " ject of regulating the liquor traffic with them. This " power residing in Congress, that body is necessarily " supreme in its exercise. That has been too often de- " cided by this Court to require argument or even refer- " ence to authority.

" Neither the Constitution of the State nor any act of " its legislature, however formal or solemn, whatever " rights it may confer on those Indians or withhold from " them, can withdraw them from the influence of an act of " Congress which that body has the constitutional right " to pass concerning them. Any other doctrine would " make the legislation of the State the supreme law of the " land, instead of the Constitution of the United States, " and the laws and treaties made in pursuance thereof.

" If authority for this proposition, in its application " to the Indians, is needed, it may be found in the cases " of the *Cherokee Nation* v. *The State of Georgia* (5 " Peters, 1) and *Worcester* v. *The State of Georgia* (6 " Peters, 515."

In *Elk* v. *Wilkins*, 112 U. S., 94, the Court, speaking by Mr. Justice Gray, said: (p. 100)

" The alien and dependent condition of the members of " the Indian tribes could not be put off at their own will,

" without the action or assent of the United States. They " were never deemed citizens of the United States, except " under explicit provisions of treaty or statute to that " effect, either declaring a certain tribe, or such member " of as chose to remain behind on the removal of the tribe " westward, to be citizens, or authorizing individuals of " particular tribes to become citizens on application to a " court of the United States for naturalization, and satis- " factory proof of fitness for civilized life; for examples of " which see treaties" (citing a large number of treaties " and cases).

In the *United States* v. *Kagama*, 118 U. S. 375, the Court, speaking by Mr. Justice Miller, said: (p. 383)

" It will be seen at once that the nature of the offence " (murder) is one which in almost all cases of its commis- " sion is punishable by the laws of the States, and within " the jurisdiction of their courts. The distinction is " claimed to be that the offence under the statute is com- " mitted by an Indian, that it is committed on a reserva- " tion set apart within the State for residence of the tribe " of Indians by the United States, and the fair inference " is that the offending Indian shall belong to that or some " other tribe. It does not interfere with the process of " the State Courts within the reservation, nor with the " operation of State laws upon white people found there. " Its effect is confined to the acts of an Indian of some " tribe, of a criminal character, committed within the " limits of the reservation.

" It seems to us that this is within the competency of " Congress. These Indian tribes ARE the wards of the " nation. They are communities *dependent* on the United " States. Dependent largely for their daily food. De- " pendent for their political rights. *They owe no alle-* " *giance to the States, and receive from them no protec-* " *tion*. Because of the local ill-feeling, the people of the

"States where they are found are often their deadliest "enemies. From their very weakness and helplessness, "so largely due to the course of dealing of the Federal "Government with them and the treaties in which it has "been promised, there arises the duty of protection and "with it the power. This has always been recognized by "the Executive and by Congress, and by this court, when-"ever the question has arisen.

"In the case of *Worcester* v. *The State of Georgia*, above "cited, it was held, that though the Indians had by treaty "sold their lands within that State, and agreed to move "away, which they had failed to do, the State could not, "while they remained on these lands, extend its laws, "criminal and civil, over the tribes; that the duty and "power to compel their removal was in the United States, "and the tribe was under their protection and could not "be subjected to the laws of the State and the process of "its courts.

"The same thing was decided in the case of *Fellows* v. "*Blacksmith and Others*, 19 How., 366. In this case, "also, the Indians had sold their lands under the super-"vision of the States of Massachusetts and New York, "and had agreed to remove within a given time. When "the time came a suit to recover some of the land was "brought in the Supreme Court of New York, which gave "judgment for the plaintiff. But this court held, on writ "of error, that the State could not enforce this removal, "that the duty and power to do so was in the United "States. See also the case of the *Kansas Indians*, 5 "Wall., 737; *New York Indians*, 5 Wall., 761.

"The power of the General Government over these rem-"nants of a race once powerful, now weak and diminished "in numbers, is necessary to their protection, as well as "to the safety of those among whom they dwell. It must "exist in that government because it never has existed "anywhere else, because the theatre of its exercise is

"within the geographical limits of the United States, be-
"cause it has never been denied, and because it alone can
"enforce its laws upon all the tribes."

And in *Jones* v. *Meehan*, 175 U. S., the Court, speaking by Mr. Justice Gray, said (p. 29):

"In one of the cases reported under the name of *The*
"*Kansas Indians* (1866), 5 Wall., 737, this Court,
"reversing the judgment of the Supreme Court of Kan-
"sas in *Blue Jacket* v. *Johnson County*, 3 Kansas, 299,
"held that lands which, pursuant to the treaty of
"May 10, 1854, between the United States and the
"Shawnee Nation of Indians (10 Stat., 1063) had been
"patented to a chief of that nation, were not subject to
"taxation by the State of Kansas so long as the tribal
"organization remained and was recognized by the poli-
"tical department of the Government; and Mr. Justice
"Davis, in delivering judgment, said: 'This people have
"'their own customs and laws by which they are gov-
"'erned. Because some of those customs have been
"'abandoned, owing to the proximity of their white
"'neighbors, may be an evidence of the superior influ-
"'ence of our race, but does not tend to prove that their
"'tribal organization is not preserved. There is no evi-
"'dence in the record to show that the Indians with separate
"'estates have not the same rights in the tribe as those
"'whose estates are held in common.' 'As long as the
"'United States recognize their national character, they
"'are under the protection of treaties and the laws of
"'Congress, and their property is withdrawn from the
"'operation of State laws' (5 Wall., 756, 757). See
"also the opinion delivered by Judge Woods, with the
"concurrence of Mr. Justice Harlan, in the Circuit Court,
"in *Waupenmanqua* v. *Aldrich* (1886), 28 Fed. Rep.,
"489, 495."

In *Talton* v. *Mayes*, 163 U. S., 376, the Court, speaking by Mr. Justice White, said (p. 383):

"It cannot be doubted, as said in *Worcester* v. *The* "*State of Georgia*, 6 Pet., 515, 559, that prior to the "formation of the Constitution treaties were made with "the Cherokee tribes by which their autonomous exist- "ence was recognized. And in that case Chief Justice "Marshall also said (p. 559):

" 'The Indian nations had always been considered as " 'distinct, independent political communities, retain- " 'ing their original natural rights. * * * The very " 'term "nation," so generally applied to them, means " 'a "people distinct from others." The Constitution, " 'by declaring treaties already made, as well as those to " 'be made, to be the supreme law of the land, has " 'adopted and sanctioned the previous treaties with " 'the Indian nations, and consequently admits their " 'rank among those powers who are capable of making " 'treaties.'

"In reviewing the whole subject in *Kagama* v. *United* "*States*, 118 U. S., 375, this court said (p. 381):

" 'With the Indians themselves these relations are dif- " 'ficult to define. They were, and always have been, " 'regarded as having a semi-independent position when " 'they preserved their tribal relations; not as States, " 'not as nations, not as possessed of the full attributes " 'of sovereignty, but as a separate people with the power " 'of regulating their internal and social relations, and " 'thus far not brought under the laws of the Union, or " 'of the State within whose limits they resided.'

"True it is that in many adjudications of this court "the fact has been fully recognized that although pos- "sessed of these attributes of local self-government, when "exercising their tribal functions, all such rights are sub- "ject to the supreme legislative authority of the United

" States, *Cherokee Nation* v. *Kansas Railway Co.*, 135 " U. S., 641, where the cases are fully reviewed. But the " existence of the right in Congress to regulate the man- " ner in which the local powers of the Cherokee nation " shall be exercised does not render such local powers " Federal powers arising from and created by the Con- " stitution of the United States. It follows that the " powers of local self-government enjoyed by the Cher- " okee nation existed prior to the Constitution, they " are not operated upon by the Fifth Amendment, " which, as we have said, had for its sole object to " control the powers conferred by the Constitution on " the National Government." * * * * " The ques- " tion whether a statute of the Cherokee nation which " was not repugnant to the Constitution of the United " State or in conflict with any treaty or law of the United " States had been repealed by another statute of that na- " tion, and the determination of what was the existing " law of the Cherokee nation as to the construction of " the grand jury, were solely matters within the jurisdic- " tion of the courts of that nation, and the decision of " such a question in itself necessarily involves no infrac- " tion of the Constitution of the United States. Such has " been the decision of this court with reference to similar " contentions arising upon an indictment and a convic- " tion in a State court. *In re Duncan*, 139 U. S. 449. " The ruling in that case is equally applicable to the con- " tentions in this particular arising from the record be- " fore us."

And in *Roff* v. *Burney*, 168 U. S. 218, the Court, speaking by Mr. Justice Brewer, said (p. 221):

" The condition of the Indians and Indian tribes within " the limits of the United States is anomalous. The tribes, " though in certain respects regarded as possessing the " attributes of nationality, are held to be not foreign, but

"domestic dependent nations. *Cherokee Nation* v. *Geor-*
"*gia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet. 515; *Choc-*
"*taw Nation* v. *United States*, 119 U. S. 1; *Cherokee Na-*
"*tion* v. *Kansas Railway Company*, 135 U. S. 641.
"While the Indians and the territory which may have
"been specially set apart for their use are subject to the
"jurisdiction of the United States, and Congress may pass
"such laws as it sees fit prescribing the rules governing
"the intercourse of the Indians with one another and
"with citizens of the United States, and also the courts
"in which all controversies to which an Indian may be a
"party shall be submitted (*United States* v. *Rogers*, 4
"How. 567; *United States* v. *Kagama*, 118 U. S. 375;
"*Gon-shay-ee, Petitioner*, 130 U. S. 343; *Cherokee Na-*
"*tion* v. *Kansas Railway Company*, *supra*) the mere
"fact that a citizen of the United States has become a
"member of an Indian tribe by adoption may not neces-
"sarily cancel his citizenship. As said by Chief Justice
"Taney in *United States* v. *Rogers*, *supra* (573), 'what-
"'ever obligations the prisoner may have taken upon
"'himself by becoming a Cherokee by adoption, his re-
"'sponsibility to the laws of the United States remained
"'unchanged and undiminished.' Indeed by §439, chap.
"182, 26 Stat. at L. 99 provision is made for the naturali-
"ization of members of the Indian tribes in the Indian
"territory, with a proviso that the Indians who become
"citizens of the United States under the provisions of this
"act do not forfeit or lose any rights or privileges they
"enjoy or are entitled to as members of the tribe or na-
"tion to which they belong.

"Now, according to this complaint, plaintiff was a cit-
"zen of the United States, Matilda Bourland was not a
"Chickasaw by blood but one upon whom the right of
"Chickasaw citizenship had been conferred by an act of
"the Chickasaw legislature. *The citizenship which the*
"*Chickasaw legislature could confer it could withdraw.*

"*The only restriction on the power of the Chickasaw*
"*nation to legislate in respect to its internal affairs is*
"*that such legislation shall not conflict with the Consti-*
"*tution or laws of the United States, and we know of no*
"*provision of such Constitution or laws which would be*
"*set at naught by the action of a political community*
"*like this in withdrawing privileges of membership in*
"*the community once conferred.* The Chickasaw legis-
"lature by the second act, whose meaning is clear, though
"its phraseology may not be beyond criticism, not only
"repealed the prior act but canceled the rights of citizen-
"ship granted thereby, and further directed the governor
"to remove the parties named therein and their descend-
"ants beyond the limits of the nation. This act was not
"one simply taking effect as of the date of its passage,
"and then withdrawing rights admitted to have been
"theretofore legally granted, but was retroactive in its
"scope, and purported to annul and destroy all that had
"ever been attempted to be done in respect to the matter;
"whether any right of property could be taken away by
"such subsequent act need not be considered. It is
"enough to hold that all personal rights founded on the
"mere status created by the prior act fell when that status
"was destroyed. Plaintiff never took any oath of alle-
"giance to the Chickasaw nation; never in terms relin-
"quished his full rights as a citizen of the United States.
"Doubtless by intermarriage with one who was at the
"time by legislative act a Chickasaw citizen, he acquired
"the rights and privileges of a member of that tribe or
"nation, but when that which was the foundation upon
"which such acquisition rested was taken away by act of
"the nation, then all those rights and privileges ceased.
"The tie that bound him to the nation was his wife's cit-
"izenship. That tie the nation destroyed. Its destruc-
"tion released him. That such was the effect of this
"legislative act is established by the conduct of the

"Chickasaw government and all its officials, for they have "refused to recognize plaintiff as any longer a member of "the Chickasaw nation, and the courts of that nation "have declined to entertain jurisdiction of any suits "brought by him against a Chickasaw. The validity of "the act withdrawing citizenship from the wife of the "plaintiff, and the consequent withdrawal from plaintiff "of all the rights and privileges of citizenship in the "Chickasaw nation, has been practically determined by "the authorities of that nation, and that determination "is not subject to correction by any direct appeal from "the judgment of the Chickasaw courts."

Italics mine.

1. *The facts as to the existence of the Onondagas.*

Here is a case where a treaty was made by the United States with the Six Nations *before* the adoption of the Constitution (*Post*, Appendix, p. 24). That treaty expressly recognized the national existence of the Onondagas. The rule of *Talton* v. *Mayes* (163 U. S., 376), just quoted, therefore applies. The Constitution therefore "adopted "and sanctioned" that treaty, "*and consequently admits* "*their rank among those powers who are capable of* "*making treaties*"; and it "follows that the powers of "local self-government enjoyed by the" Onondaga "nation existed prior to the Constitution," and since they are not repugnant to the Constitution, nor to any act of Congress since passed, they still exist.

Then came the treaty of 1794, of which one of these wampums is the record, and that again recognized the national existence of the Six Nations and of the Onondagas (*Post*, Appendix, p. 26); and under that treaty the political authorities of the Government have recognized the national existence of the Six Nations and the Onondagas ever since

by paying the money which by that treaty it is to pay to those nations (*Ante*, p. 11, 31 Stat., 1064). *The Kansas Indians*, 5 Wall. 737 ("if the National government " makes treaties with, *and has its Indian agent among* " *them, paying annuities*, and dealing otherwise with " 'headmen,'" p. 737).

In 1802 the United States made a treaty with the Senecas, especially recognizing the existence of that nation as a nation, 7 Stat., 72.

In 1823 the Court of Errors of New York, then its highest court, expressly *held* that the Oneidas were a nation, *Goodell* vs. *Jackson*, 20 J. R., 693 (opinion quoted above, p. 56). And the opinion says the same of all the others of the Six Nations.

The United States treaty of 1838 expressly recognized the national existence of the Six Nations and of the Onondagas, and the treaty of 1842 the national existence of the Senecas. These are the treaties of which the Court, speaking by Mr. Justice Nelson, said in *The New York Indians*, 5 Wall. 761, 766: "These treaties are historical and need " not be referred to, beginning in 1784 and coming down " to 1842. That of 1794, entered into at Canandaigua, " New York, may be cited as a specimen." And in that case it held that those treaties were "the supreme law of the land" (5 Wall. 768).

In 1845 the Legislature of New York passed a law (Chap. 150, p. 146, Laws 1845) by which it expressly enacted that the Senecas should "be deemed to hold and " possess the said reservations *as a distinct community*, " and in and by the name of '*The Seneca* NATION *of* " '*Indians*,'" might sue in all courts.

In 1866 the Court, in the case of *The New York Indians* (5 Wall. 761), expressly held that the Senecas and Tuscaroras were nations, because it held that New York could not tax their lands even though the taxing law distinctly provided that it should not affect the Indians nor their

possession, and it inferentially held that all of the Six Nations were existing as nations, since it based its holding on the treaties made with them.

Criminal cases in which the individuals of the Six Nations are concerned are all in the courts of the United States. If the national existence had ceased they would all be in the state courts.

Pennock vs. *Commissioners*, 103, U. S., 44.

The *Vreeland* bill, which was to parcel out the lands of the Senecas among the individuals, with the object, doubtless, of getting them for sale, has just—last week—failed in the Senate, which, I submit, is a *legislative* recognition of the national existence.

It expressly appears in the proof that in 1888 a general ruling council of the Six Nations was held at which the Saint Regis Mohawks were formally admitted to the League as the successors of the original Mohawks who had all moved to Canada at the end of the Revolution and never came back (Above, p. 42, R. 110).

Here is the proof of the condition of the Onondagas in 1890 (Above, p. 39, R. 107):

"*The Onondaga Nation is governed by 27 chiefs* "all but 2 being of the pagan party; 2, however, are "sons of christian ministers, and others professed for a "time to be christians, but quietly rejoined old associa- "tions. Albert Cusick, lay reader in the Church of the "Good Shepherd, held the office of to-do-da-ho (presi- "dent) at one time, but was deposed on account of his "religion. Those who have thus resumed their former

" political and social relations are among the most per-
" sistent in opposing a change. Daniel LaForte, a genial
" man in his own house, and once active in church work,
" is one of this number. It is, nevertheless, true that
" many of the most influential, whose property is gaining
" in value and whose business gradually increases their
" dependence upon the white people for a market and
" like benefits, realize that their own interests would be
" more secure under some recognized code of law for the
" government of the nation.

"*The ruling chiefs, chosen by the females of the fami-*
" *lies represented, as in very ancient times, are practi-*
" *cally in office for life.* In case of a vacancy the suc-
" cessor chosen may be under age."

The names of the chiefs are given (*Above*, p. 40; R. 108), and with two exceptions the chiefs who voted at the Council of 1898 (R. 182) are of those named in 1890. The proof (General Carrington) is that in 1890 the Onondagas had a to-do-da-ho or president and a wampum-keeper just as always (R. 103; *Above*, p. 46).

In 1896 the Onondagas adopted a Constitution. This is printed at page 150 of the record, and the important parts of it are as follows:

" 1st. The Chiefs of the Onondaga Nation of Indians
" shall have power to elect President, Secretary, Treasurer
" and Marshall, and they shall be elected annually from
" amongst those number of the Chiefs of said Nation.

" 2nd. The Sachem Chiefs shall be enrolled in the Book
" of Records, which shall be kept by the Secretary of the
" Nation in each meeting of the Chiefs; eight of these
" number of the Chiefs shall constitute a Quorum for the
" transaction of national business; the chiefs whose age
" under twenty-one years of age shall not be entitle seat
" in Council; and to all Bills for the appropriation of pub-

"lic monies the assent of eight chiefs in Council shall be "necessary in order that the bill should become a law."

Baptiste Thomas (Say-hah-que) the treasurer of the nation swore that the chiefs were appointed in the same way in which they had always been (R. p. 145) and that there were twenty-four of them then living (R. 146).

In 1899 the legislature of New York passed an act which contained the following (Chapter 153, Laws 1899; *post* Appendix, p. 21; R. 184):

"Section 1.—The university of the state of New York, "which was duly elected to the office of wampum-keeper "*by the Onondaga nation*, on February twenty-sixth, "eighteen hundred and ninety-eight, and which by unani- "mous action of its regents on March twenty-second, "eighteen hundred and ninety-eight, accepted such elec- "tion as authorized to do by law, and which accepted "the custody of the wampums as formerly transferred "to the chancellor as part of the exercises *and with* "*the unanimous approval, both of the election and* "*transfer, by the council of the Five Nations, held* "*in the senate chamber of the capitol at Albany on June* "*twenty-second, eighteen hundred and ninety-eight, by* "*duly chosen representatives of all the original nations* "*of the Ho-de-no-sau-nee*, shall hereafter be recognized," etc.

It is true that that act also contained the following:

"§ 2. The provisions of this act shall not apply to the "subject mater of any litigation now pending in any court "of this state."

and that this action was then pending, but I suppose the act is evidence of the national existence of the Onondagas and the Six Nations;

And Mr. Sanborn, the defendant's other witness besides General Carrington, said as to this matter (R. 121):

"For the last—as I understand it—ten to twelve years,

"the Onondagas have been struggling into the same "form of government. As to the other tribes the ancient "form of government has never been abandoned; some "of them are in a somewhat chaotic state, the Onondagas "in particular."

BUT on his cross-examination he admitted and expressly stated that the only difference was the adoption of the Constitution (R. 138–139).

Well: We put in the Constitution (R. 150).

And they are just as numerous as they were in the days of their great Indian empire (R. 90).

It follows that the finding:

"*VI.—That at a time many years prior to the 10th "day of February, 1891, the ancient Confederacy above "referred to, composed first of the five and then of the "six tribes or nations of Indians above mentioned, was "dissolved and thereafter had no active or actual exist- "ence. That its respective names had become associated "with a period long gone by; that the tribes of which it "consisted had become separated, and to a large extent "scattered and dispersed throughout the United States "of America and the Dominion of Canada, and those "who had remained in this country had become wards of "the Government.* (R. 31.)

is without any evidence under it.

11. *That the university of the State of New York had and has power to receive the wampums on deposit and to recover them, for that purpose, by action, is very plain.*

It is a corporation forever with "power to sue and be sued" and to hold property (*post* Appendix, p. 16).

By Chapter 378 of the Laws of 1892, the following powers were conferred (*post*, Appendix, p. 17):

"§ 10. DEPARTMENTS AND THEIR GOVERNMENT.—The "state library and state museum shall be departments of "the University, and the regents may establish such other "departments as they deem necessary to discharge the "duties imposed on them by law. All University depart- "ments shall be under exclusive control of the regents "who shall have all powers of trustee thereof, including "authority to appoint all needed officers and employees; "to fix their titles, duties, salaries and terms of service; "to make all needed regulations; and to buy, sell, ex- "change or receive by will, gift, *or on* DEPOSIT, articles "or collections properly pertaining thereto;"

Chapter 586, Laws 1895, is as follows:

"AN ACT to provide for the collection of historical and "ethnologic records and relics of the American Indians of "the state of New York, and making an appropriation "therefor."

"Section 1. There shall be made, as the Indian section "of the state museum, as complete a collection as practi- "cable of the historical, ethnographic and other records "and relics of the Indians of the state of New York, in- "cluding implements or other articles pertaining to their "domestic life, agriculture, the chase, war, religion, burial "and other rites or customs, or otherwise connected with "the Indians of New York.

"§ 2. The trustees of the state museum (the regents) "shall appoint on its staff a competent curator*, without "salary, to make and arrange this Indian collection, and "for his necessary expenses, and for collecting or buying "specimens for the Indian collection, there shall be paid

*Mr. Richmond, the witness of that name in this case, was appointed and served without compensation until his death.

"by the treasurer, on the warrant of the comptroller, from "any money not otherwise appropriated, not to exceed "five thousand dollars."

Laws since, down to the appointment of the University, contain the following appropriations:

Chapter 791, Laws 1897, Section 1 (Vol. 1, p. 858).

"For additions to the Indian Museum, in accordance "with chapter five hundred and eighty-six of the laws of "eighteen hundred and ninety-six, providing that the "curator shall serve without salary, the sum of two "thousand dollars."

Chapter 606, Laws 1890, Section 1 (Vol. 2, p. 1436).

"For additions to the Indian Museum, in accordance "with chapter five hundred and eighty-six, laws of "eighteen hundred and ninety-six, provided that the "curator shall serve without salary, two thousand dol- "lars."

Chapter 569, Laws of 1899 (vol. 2, p. 1206).

"For additions to the Indian Museum, in accordance "with chapter five hundred and eighty-six laws of eighteen "hundred and ninety-six provided the curator shall serve "without salary, one thousand dollars."

III.—*The selection of the University by the Onondagas.*

The following paper was put in evidence—under the following circumstances (R. 61):

Mr. Paige: "I will offer in evidence minutes of a Council "held by the Onondagas on the 26th of February, 1898, "you do not object on the ground that the signatures are "not proved?"

"*Mr. Delehanty: No. I will admit that it is a genuine "document, and the genuine signatures are there.*"

"At a council of the Onondaga nation held at the house "of Daniel La Forte in Onondaga on the 26th day of "February 1898 held pursuant to call and notice given "to all the chiefs.

"*Present*

"Te-hes-ha	Daniel La Forte, *president*	
"Say-ha-que	Baptist Thomas, *treasurer*	
"An-wa-ga-yat	Orris Farmer, *secretary of the nation*	
"Ha-say-gwa-e-say	Jacob Skenandoah	*sachems and chiefs*
"So-day-qua-scum	Asa Wheelbarrow	
"Sa-da-qua-seh	Jacob Bigbear	
"Ha-e-ho	Levi Webster	
"O-gayis-qua	John Farmer	
"Ho-yo-ne-a-ne	William Webster.	
"Ga-na-ha-guh-yat	Wallace Carpenter	
"Ha-wen-jo-wah-e	Enoch Skenandoah	
"Hos-hay-qua	Charles Lyon	

"The following resolutions were unanimously adopted.

"*Resolved*, That the University of the State of New "York be and it hereby is elected wampum keeper of the "Onondaga nation, with full power *and it shall be its "duty to get possession of and safely keep forever all "wampums* of the Onondaga nation and the Five nations "and Six nations and each of them.

"Whereupon the University of the State of New York "was unanimously elected to the office of wampum-"keeper.

"A true copy from the minutes

"Say ha-que	Baptist his x mark Thomas
"Sa-da-qua seh	Jacob his x mark Bigbear
"Ha-wen-jo-wah-e	Enoch Scanandoah
"Ha-say-gwa e-say	Jacob A. Scanandoah
"Ha-e-ho	Levi his x mark Webster

" Ho-yo-ne-a-ne	William his x mark Webster
" O-gayis-qua	John R. Farmer
" Ga-na-ha-guh-yat	Wallace his x mark Carpenter
" So-day qua scum	Asa his x mark Wheelbarrow
" Ah-wa ga-yat	Orris Farmer
" Te hes-ha	Daniel La Forte
" Hos-hay-qua	Charles Lyon

" In presence of
" Harriet Maxwell Converse
" A. G. Richmond
" Edward Winslow Paige"

This "genuine document" recites that "at a council "of the Onondaga Nation" in Onondaga, held pursuant "to call and notice given to all the chiefs"—there were present twelve chiefs including the president, secretary and treasurer of the nation, and that the following resolution was unanimously adopted—

"*Resolved*, That the University of the State of New "York be and it hereby is elected wampum keeper of the "Onondaga Nation, *with full power and it shall be its* "DUTY *to* GET *possession of and safely keep* FOREVER all "wampums of the Onondaga Nation and the Five Na- "tions and Six Nations and each of them.

"Whereupon the University of the State of New York "was unanimously elected to the office of Wampum- "Keeper."

And it is further said to be *a true copy from the minutes.*

And then follow the "genuine" signatures of the twelve chiefs.

Capitals and italics mine.

Then followed this (fol. 197):

Mr. Paige: * * * *

"I will put in from the record book of the Onondaga "Nation the Constitution with which the Nation is at "present governed. I will have a copy sent to the sten- "ographer. That will be Ex. 8."

This constitution is printed at page 150 of the Record. It contains the following:

"2nd. The sachem chiefs shall be enrolled in the Book " of Records, which shall be kept by the Secretary of the " Nation in each meeting of the chiefs; roll shall be " called by the secretary of the nation, *eight* of there " number of the chiefs shall constitute a Quorum for the " transaction of national business;"

There is not anything else of importance to this case in it except that it provides for the offices of President, Secretary Treasurer and Marshall, and defines their duties.

We then called Baptiste Thomas, the treasurer of the Nation, who testified that the number of the chiefs was about twenty-four (24) (R. 146), and that the chiefs were appointed in the same way that they always had been (R. 145).

We had already proved and the trial court had found that the Onondaga Nation was the official custodian (R. 30).

The above is ALL *the evidence.*

It is thus gravely admitted upon the record that at a regular council—being the sole governing body of the Onondaga Nation—the university was directed and it was made its "DUTY to get possession of and safely keep for- "ever all wampums."

The Onondaga Nation has, we will say, some sixteen hundred members. Of course *all the sixteen hundred*

members cannot be, all of them, keeping *four* wampums all the time.

Still, it is the *duty* of the Nation to keep them safely. This being the case, cannot the governing council, even though it be composed of nothing as good as infants—since an infant can sue by a guardian while an Indian can not sue in any way—*cannot the Governing Council put them in a safe deposit company?*

If it can, it is with deference submitted, that it can "deposit" them with the University of the State of New York.

Upon this state of facts the Court of Appeals of New York gave judgment as follows (R. 189):

"As to the University of the State of New York, one "of the plaintiffs, the finding of fact by the trial judge "'that the University of the State of New York never "'purchased any or either of the wampum belts men-"'tioned and described in the complaint, and that said "'University of the State of New York never was se-"'lected or "raised up" to the position or office of "wam-"'pum-keeper," and no official proceedings were ever be-"'gun on the part of any of the tribes of Indians which "'formerly composed the Iroquois Confederacy for the "'purpose of conferring any such position or office upon "'said University of the State of New York, assuming "'that there is or was, at the time of said alleged pro-"'ceedings, any such official position,' *is supported by "evidence*, and the judgment having been affirmed at the "Appellate Division, it is, therefore, conclusive upon us."

It is plain that this is a holding that the Council of the Onondagas *had no power* to select a depositary for the wampums. It is not that the University could not take,

could not act and could not sue, BUT "*that it never was* SELECTED" for the position of wampum-keeper. As the action of the Council *selecting* it, or *voting its selection* is admitted on the record this can only mean that the action of the Council of the Onondagas *was void as beyond its power*, and thus the Federal question is right up, because the case was decided by the Court of Appeals upon that question *solely*.

And this is what the courts below meant also. Mr. Justice Hiscock, who held the trial Court said (R. 161):

"Independent of defendant's contention that such "duties would be quite outside of those for which said "university is supposed to have been organized, there "seems to me to be difficulties with the claim from the "Indians' standpoint. In the light of all the traditions, "not to say romance, which have been woven into this "subject of Indian history, the idea seems somewhat "incongruous of the University of the State of New "York as the final successor in a line of red-skinned "and pagan wampum-keepers reaching back beyond the "time when Hendrick Hudson sailed up the North River. "Tested also by the somewhat rigid and entirely un-"romantic rules of legal title, I am unable to find "sufficient proof that the proceedings taken by the "Onondaga Indians were sufficient to confer the position "of wampum-keeper, assuming that there is such an "one."

And the Appellate Division said (R. 176):

"The only plaintiff which can by any possibility "maintain this action, therefore, is the University of "the State of New York. It undoubtedly has power "to bring actions generally. It is a corporation having "capacity to sue and be sued. It has a state museum "under chapter 378 of the Laws of 1892, and an Indian "section thereof, under chapter 586 of the Laws of

"1896; and it has power under the statute to acquire "title to such articles as these wampum belts, and to "recover possession thereof by actions in the courts like "the present one. It seems to us *ridiculous*, however, "to say that it could be constituted a wampum-keeper of "any Indian tribe or confederacy. It was not an Indian, "and had no statutory right or power to be con- "stituted an Indian or a wampum-keeper, of the kind "indicated by the evidence given in the case. *This* "*claim is not worthy of any serious consideration.*"

All I claimed or had need to claim was this:—that the wampum records being the property of the Ho-de-no-sau-nee and committed to the custody of the Onondaga Nation—which was accordingly responsible for their safe-keeping—and since the Onondaga Nation, being composed of many, could only keep them safely by committing them to the care of some one person or thing—a safe deposit company, for instance—the safe deposit company would thus become the trustee of an express trust and could sue to recover the possession of the wampum records:

Smith v. *James*, 7 Cow, 328 (quoted below), and that it need not have described itself in the title as a trustee of an express trust—see *Stillwell* v. *Carpenter*, 62 N. Y. 639, 640; 6 Abb. N. C. 238, 263—and that the bailor might be a sort of infant without capacity to sue is no answer.

Jefferson County Bank v. *Townley*, 159 N. Y., 490, 499.

O'Brien v. *East River Bridge Co.*, 161 N. Y., 539, 549.

All this may be "ridiculous," as the Appellate Division

says, but I do, with deference, submit that it is most common and familiar law.

In this instance, the Onondaga Nation did not select a safe deposit company for the safe-keeping of the wampums—but it *did* select the University of the State of New York—and there is not a shadow of doubt but what the University had the right to take them and to sue for them (See the Statutes in Appendix, pp. 8 *et seq.*). Nor, as I submit, is it so entirely ridiculous that the Onondaga Nation should elect the University to the ancient office of wampum-keeper. At any rate—ridiculous or not—it is difficult to see what the Supreme Court of New York has got to do with it.

In the "Life and Times of David Zeisberger," by Edmund de Schweinitz, Phila., 1870, p. 217, it is said of Zeisberger in 1754:

"The most distinguished token of confidence, however, "was given him by the Grand Council, which deposited "its entire archives, comprising many belts and strings of "wampum, written treaties, letters from Colonial Gov-"ernors, and other similar documents, in the Mission "House, and constituted him the keeper of these impor-"tant records."*

The Onondaga Nation could have deposited the wampums in a safe deposit company or committed them to any one for safe keeping, and such a depositee would be a trustee of an express trust within the meaning of § 449 of the Code of Civil Procedure of New York.

Assume that the election of the University as an official —the wampum keeper—is not good: still, the resolution provides that "it shall be its duty to get possession of "and safely keep forever all wampums of the Onondaga "Nation and the Five Nations and Six Nations and each "of them" (R. 62).

* "Statements made at a missionary festival, at Bethlehem, as recorded "in the Bethlehem Diary, under date of August 2, 1755."

This makes it a trustee of an express trust within Section 449 of the Code of Civil Procedure of New York.

Myers *v.* Machado, 6 Abb. Pr. 198.
Harrison *v.* Marshall, 4 E. D. S. 271.

I do not claim any more for the Onondaga's bill of sale than that it gives to the University the right to use the names of the chiefs who signed it, and the name of the nation to recover the wampums and their respective shares in the ownership of the wampums.

The wampums are still the property of the Ho-de-no-sau-nee.

But the election of the University as wampum-keeper, ratified as it has been by a Six Nation Council—is good, and would have been good without that ratification—*and so long as the University of the State of New York exists* the wampums will remain where they ought to be—safe—and where they can be seen and used by the Indians, as they have been used.

When the University ceases to exist, if that time ever comes, the Onondagas can elect another wampum-keeper.

IV.—*The university can maintain this action although it has not yet been in possession of the wampums*—

because

In Smith *v.* James, 7 Cow. 328, the court, speaking by Mr. Chief Justice Savage, said (p. 329):

"I am free to admit that the consignees in this case "had, by the plaintiff's letter, such an interest in the "property consigned to them, as would have enabled "them to sustain the action. In *Fowler* v. *Down* (1 B. & "P. 47, chief justice Eyre says, 'it is not true that in "'property the party must once have had possession "'in order to maintain trover; for a factor to whom "'goods have been consigned, and who has never recovered

"'them, may maintain such an action.' But the action "cannot be maintained by both general and special "owner; and a recovery by one is a bar to an action "by the other."

V.—*And the question was reviewable in the Court of Appeals and is reviewable here.*

By the practice of New York

A finding by a court or a referee, made without any evidence to sustain it, is a ruling upon a question of law and an exception may be taken thereto, which is reviewable in the Court of Appeals.

The Constitution of New York now provides

(Art. VI, § 9): "After the last day of December, one "thousand eight hundred and ninety-five, the jurisdiction "of the Court of the Appeals, except where the judgment "is of death, shall be limited to the review of questions "of law. No *unanimous* decision of the Appellate Divi- "sion of the Supreme Court that there is evidence sup- "porting or tending to sustain a finding of fact or a "verdict not directed by the court, shall be reviewed by "the Court of Appeals."

Italics mine.

This however was not an unanimous affirmance within the meaning of that provision.

Mr. Justice McLennan sat in the court *but did not vote* (R. 167).

Warn v. *N. Y. C. & H. R. R.R. Co*—163 N. Y. 525—was thus:

The record was "Ordered, Justice McLennan sitting, "but not voting, and the remaining four judges concurring, "that the said judgment so appealed from be affirmed."

And the court, speaking by Judge Werner, said: (p. 526)—

"This is not a unanimous affirmance. The cases of "*Harroun* v. *Brush El. Light Co.* (152 N. Y. 212) and "*McDonnell* v. *N. Y. C. & H. R. R. R. Co.* (159 N. Y. 524) "are not in conflict with this decision. In the former "case, the record recited four justices as sitting, and they "all concurred; in the latter case all the justices com- "posing the court heard the argument, but one of them "died before it was decided. In this case one of the sit- "ting justices did not vote, although he had the right to "do so."

The matter is therefore reviewable and the practice of this Court leads to the same result. It is only where the finding of the court below is not "clearly in conflict with "the evidence" that the Court will not disturb it—*Illinois* v. *Illinois Central R. Co.*, 184 U. S. 77, 98.

II.

The Court erred in ruling out Clark's History of Onondaga.

This evidence was offered and is printed at pages 51 to 54 of the Record, inclusive, and is copied above, pp. 17–20. The court admitted the part which is printed in roman and ruled out that which is printed in italics.

His Honor's reason for the ruling of the court is thus given (R. 160):

"Some of these extracts offered in evidence relate to

"ancient times and are manifestly based upon hearsay "and tradition. Some, as those in reference to Os-sa-hin- "ta and his associate chiefs of the Onondagas, relate to "alleged facts of a comparatively recent date. Some, as "those descriptive of the various wampums and of the "bag in which they were kept, are apparently based "upon the personal observation of the historian and do "not relate to facts of general historical interest and "repute.

"It was conceded upon the trial that each of these "historians was dead, and no question was raised as to "their character and reliability as such.

"I think that the extracts from Morgan's history, and "those of the first class from Clark's were competent evi- "dence."

The parts which the court ruled out gave the names of the wampum-keepers and the description of the wampum-records as they were in 1847, describing, at least, two of the wampum-records in question and bearing directly upon the issues as to whether the Onondagas then had a national existence—a wampum-keeper—and these wampum records.

We submit that, if the book was admissible at all, one part of it was just as much admissible as the other, and that the matters of there being such things as wampum records and wampum-keepers were matters of general interest to the whole of the Ho-de-no-sau-nee within the meaning of the adjudged cases.

Morris v. *Harmer's Lessee*, 7 Pet. 554, 557.
Bogardus v. *Trinity Church*, 4 Sandford's Chancery (N. Y.), 633, 746.

III.

The individual Indian plaintiffs.

In *Felix* v. *Patrick*, 145 U. S. 317, 332; 36 Fed. 457, 461, the Court held that an individual Indian could sue in the courts of the State of Nebraska. The question was a question of laches—and the Court held that although the plaintiff could not have sued in the Courts of the United States, because of the want of citizenship, he could have sued in the courts of Nebraska.

Mr. Justice Brown cites cases (145 U. S. 317, 332), and Judge Brewer, in the Circuit Court, also cites cases (36 Fed. 457, 461).

Eddy v. *Lafayette*, 163 U. S., 456, was this:

An action was brought by "Sallie M. Hailey, an "Indian, and residing in the Indian Territory" (p. 458), and Ben F. Lafayette, a white man, against the receivers of "the Missouri, Kansas and Texas Railway," for negligently burning a lot of hay, which Mrs. Hailey claimed to own, and which Lafayette had cut for her by virtue of a contract with her which gave him a certain portion of the hay for the cutting (p. 459).

It appeared that Mrs. Hailey was a Creek Indian, residing with the Creek Nation upon the Creek reservation, and that the hay had been cut from the "public domain "or open lands of the Creek Nation, and not upon land "owned or possessed by plaintiffs or either or both of "them" (p. 460).

The plaintiffs had a verdict for $2,664. The action was brought in the United States court for the Indian Territory, and the judgment entered on the verdict having been affirmed by the Circuit Court of Appeals for the Eighth Circuit (4 U. S. App. 247), the defendants brought the case here.

The Court affirmed the judgment, and, speaking by Mr. Justice Shiras, it said (163 U. S., 465):

"But the evidence for the plaintiff tended to show that "the hay in question was cut and put up for Mrs. Sarah "M. Hailey, a citizen of the Creek Nation, who had con- "tracted with Lafayette to cut and put up the hay, and "that Lafayette was to have an interest in the proceeds "of the hay, in consideration of his services.

"There was no evidence tending to show that Mrs. "Hailey, in procuring the hay in question to be cut and "put up, was acting illegally or was in anywise a tres- "passer. And the statute above quoted (a statute of the "Creek Nation) implies that citizens of the Nation might "cut hay without limit from the common pasturage, as "it forbids only non-citizen traders from cutting hay "from the common pasturage; and we agree with the "court below that there is nothing in the present record "that would authorize us to say that the hay was gathered "on the public domain without license. No law of the "Nation was shown forbidding Mrs. Hailey from cutting "hay on land which she occupied in common with other "members of the Creek Nation."

The Kansas Indians, 5 Wall. 737, was this:

Three bills in equity, filed in the county courts of Kansas by Blue Jacket as representing the Shawnees; Yellow Beaver representing the Wea tribe, and Wan-zop-e-ah the Miamis, against the county commissioners of Johnson County and Miami County, to restrain these commissioners from selling lands for non-payment of taxes.

The county court dismissed the bills, "conceiving that "the lands were rightly taxed" (5 Wall. 737, 733), and on an affirmance of such dismissals in the Supreme Court of the state the cases were taken to the Supreme Court of the United States, which reversed them, on the ground that held (head note) the treaties with the Indians were

the supreme law of the land and that no state could in any way interfere with them, by taxing the lands or otherwise, nor fail to recognize the national or tribal existence of the Indian nation or tribe so long as the United States recognized it.

The cases in New York have been as follows:

In Jackson *v.* Goodell, 20 J. R. 188, the late Supreme Court held that the Oneida Nation had not capacity to sue.

The Court of Errors reversed the Supreme Court.

Goodell *v.* Jackson, 20 J. R. 693, Chancellor Kent delivering the opinion which has been quoted from above (p. 56).

In Strong *v.* Waterman, 11 Paige, 607, Chancellor Walworth held that individual Indians had capacity to sue.

Blacksmith v. *Fellows*, 7 N. Y., 401.

Blacksmith was a Seneca Indian residing on the Tonawanda reservation. Fellows entered on the land which Blacksmith occupied, on that reservation, and put Blacksmith off by force. Fellows claimed to own the land by virtue of a treaty, and a following deed, between the Seneca Nation, the United States and himself, by which the Seneca Nation had agreed to move, within five years, to lands granted them, for a consideration, by the Government, in what is now the state of Kansas, and the Seneca Nation accordingly deeded the whole of the Tonawanda reservation to Fellows. The five years had expired. The Seneca Nation had not moved. It has not yet moved and *it is there to this day.*

The government has just recently paid about a million

and a half of dollars to the Indians, because it sold those Kansas lands.—*The New York Indians*, 170 U. S., 1.

Blacksmith sued Fellows in trespass in the Supreme Court of New York.

On the trial, the "plaintiff having closed, the defend-"ants' counsel moved for a nonsuit, on the ground that "*the plaintiff*, AN INDIVIDUAL INDIAN, *could not main-*"*tain an action for breach of close*; the court, however, "denied the motion, and the defendants excepted." (7 N. Y., 401*a*.) Italics and capitals mine.

"The defendant's counsel also requested the court to "charge, that even if the defendants had shown no title "to the close in question in the defendant Fellows, still "*the plaintiff*, AN INDIVIDUAL INDIAN, *could not main-*"*tain the action of trespass for breaking and entering* "*the premises*. The learned judge, however, decided, "that the plaintiff being in possession could maintain the "action, and, therefore, refused so to charge; to which "the defendants took another exception." (7 N. Y., 408.) Italics and capitals mine.

Blacksmith had a verdict for $885 damages. The judgment entered upon this verdict having been *affirmed* at the General Term; Fellows appealed to the Court of Appeals—which also *affirmed* the judgment.

The court, speaking by Mr. Justice Edmonds, said: (7 N. Y., 413)

"The first point taken on the argument was, that the "plaintiff could not maintain an action, individually, "for trespass on lands belonging to the whole nation. "This might be true if the action was founded only upon "title. So, it might be true, if it was founded upon the "occupancy in common, which, we know, is usual with "the Indian tribes. But this action is not founded on "either basis, but upon the separate possession of the "plaintiff. The bill of exceptions shows that he was,

"alone and separately from all others, in possession of "the *locus in quo*, when the trespass was committed, and "that was enough to enable him to maintain an action "for a wrong done to that possession."

In the dissenting opinion—Mr. Justice Welles—it was said: (7 N. Y., p. 418)

"*The fact that he was an Indian*, it seems to me, *should* "*not* DISQUALIFY *him from seeking redress in our courts*, "*in the ordinary way, for such an injury.*"

Italics and capitals mine.

The court affirmed the judgment upon the merits upon the ground that a certain appraisement was necessary before the Indians could be removed.

Fellows thereupon brought the case here and the Court affirmed the judgment (*Fellows* v. *Blacksmith*, 19 How. 366) squarely upon the ground that, *the treaty being the supreme law of the land*, the performance of the treaty by the Indians could be compelled only by the United States—the Court, speaking by Mr. Justice Nelson, saying: (19 How. 372)

"We think, therefore, that the grantees derived no "power, under the treaty, to dispossess by force these "Indians, or right of entry, so as to sustain an action of "ejectment in a court of law; that no private remedy of "this nature was contemplated by the treaty, and that a "forcible removal must be made, if made at all, under "the direction of the United States;"

And in *Montauk Tribe* v. *Long Island R.R.*, 28 App. Div. 470, it was held that individual Indians had capacity to sue.

It seemed, therefore, at the time this action was begun, that either the Onondaga Nation or the individual Indian plaintiffs could maintain the action.

As to this we ask leave to call to the attention of the Court section 5 of the Indian Law. It is in these words:

"§ 5—ACTIONS IN STATE COURTS.—Any demand or "right of action, jurisdiction of which is not conferred "upon a peace maker's court, may be prosecuted and en- "forced in any court of the state, the same as if all the "parties thereto were citizens."

Peace maker's courts are confined to the Senecas (R. 94), and the trial court so held—holding that the individual Indians could bring it, but that the nation could not.

We had meant, in the then existing state of adjudged cases—Chancellor Walworth's decision in *Strong* v. *Waterman* (11 Paige, 607), having been—so far as his opinion shows—based entirely upon the reversed decision of the Supreme Court in *Jackson* v. *Goodell*, 20 J. R. 188, and apparently in ignorance of its reversal by the Court of Errors (20J. R. 693)—to go on with whichever plaintiff the court finally held entitled to sue and pay the bill of costs for the others.

But after the case had been argued in the Appellate Division, but before it was decided, the Court of Appeals decided the case of *Johnson* v. *Long Island Railroad Company*, 162 N. Y. 462 (opinion attached to this brief—Appendix, p. 1); and followed that decision in this case (R. 189).

An Indian must be either a citizen, an alien, or *not* an human being.

Nobody will support the last proposition. He is not a citizen. He must be an alien.

By the common law, aliens have personal capacity to sue. *Taylor* v. *Carpenter* (Court of Errors, affirming S. C., 11 Paige, 292, 2 Sand. Ch. 603, 611); *Bradstreet* v. *Supervisors of Oneida*, 13 W. R. 546. So that, unless there be some statute to the contrary, and so far as I know

there is none, an Indian has the "*personal*" capacity to come into court and sue.

Mr. Gardner's argument in the *Johnson* case was that the title to all real property was in the state, and that the right to occupation was not in any one individual Indian or any number of individual Indians, but in the tribe or nation in its *collective* capacity, and that, therefore, there was no cause of action in the plaintiffs. And so held the Court (Appendix to Brief, p. 6).

But this has no application to *personal* property.

Chancellor *Walworth* distinctly held in *Strong* v. *Waterman*, 11 Paige, 607, that Indians have the *personal* capacity to sue, and no case is cited to the contrary, nor was any cited in the *Johnson* case.

In the *Dred Scott case*, 19 How. 393, the Court, speaking by Mr. Chief Justice *Taney*, said (p. 420): "Con-"gress might, as we before said, have authorized the "naturalization of Indians *because they were aliens and "foreigners.*"

And in the case of *The Kansas Indians*, 5 Wall. 737, the Court held that because certain of the Wea Indians had sued in the courts of Kansas "*sometimes voluntarily* and in certain specified cases "by direction of the Secretary of the Interior" (p. 758), they had not submitted themselves to all the laws of the state, showing, of course, that they had *personal* capacity to sue.

The *Johnson* case is the first case in the world, so far as I can find, and, with the exception of this, the *only* case, in which it has been held that an Indian had *not* personal capacity to sue.

IV.

Given somebody who can sue, success in the action is certain.

I.—The trial court finds that the wampum records once belonged to the League and that the Onondaga Nation was their official custodian (R. 30).

"III.—That during the earliest period of the existence "of said Confederacy, the Indians of which said League "was composed made use of strings of wampum beads or "shells braided or pleated together in broad bands and "commonly known as wampum belts, as a means of com- "memorating and preserving the memory of important "events such as the making of treaties, the coming of the "white men, &c., and that while the League of the Iro- "quois was in active existence the tribes or members "thereof composing it employed this method of preserv- "ing the history of the events which they conceived to "be of importance.

"IV.—That while such custom was in vogue the care "and custody of such wampum belts as were so used was "entrusted to the Onondaga Nation, which appointed one "of its members as an official sometimes designated as "the 'wampum-keeper,' whose duty it was to preserve "the same and upon ceremonial occasions expound them "and emphasize their meanings and significance.

"V.—THAT THE WAMPUM BELTS MENTIONED AND DE- "SCRIBED IN THE COMPLAINT IN THIS ACTION CONSTI- "TUTED A PORTION OF THE WAMPUM BELTS AT ONE "TIME MADE AND POSSESSED BY THE LEAGUE AND USED "FOR THE FOREGOING PURPOSES."

Italics and capitals above, mine.

This finding, of course, ends the case, *unless* there is evidence of a transfer of the ownership of the wampums BY THE LEAGUE, to somebody else.

"*We submit that there is not any such evidence.*

All that there is in the case is General Carrington—in the following words (R. 73).

"Q. Did you visit the Onondaga Nation or Tribe? A. "At the Onondagas I found no relics of value until I "called with President La Forte upon Thomas Webster "to verify references made to him as the possessor of "wampums. It was twice or three times of calling before "the old man would show me the wampums——

"Q. When you say 'the old man,' you refer to Thomas "Webster? A. Yes, sir; I was at the time occupying "the house of Chief La Forte with my secretary. I told "him of my inquiries made elsewhere and he said that he "would secure me access to Webster's collection; that "some of them he had a good many years, and he claimed "that upon examining them he could read the ancient "history of the Six Nations. He said, 'Perhaps he will "spare you one or two. No one has any interest in them "now except himself, and he keeps them as relics of old "times.' He went to Webster and brought an old valise, "very dilapidated, and tied with a rope, which had been "under his bed, and we examined the wampums together. "A large number of beads were loose, and he gave what, "as far as he could, was his idea of the original meaning "of the wampums. I impressed upon him as well as I "could the importance of their being safely preserved "somewhere and that if he chose to have me take charge "of them, or of any of them, I would guarantee that, "either at Washington or elsewhere, in some safe place, "they would be carefully and permanently preserved. "After some reluctance he consented to come into "Syracuse and bring the valise and give me permission to "have photographs taken."

Q. This is Webster? A. Webster.

"(Witness continuing) I did this so that in case he "declined to sell any to the Government I would at least

"preserve the appearance of them. He entrusted me with "the valise, returned to the Reservation; I had them "photographed and returned them to him.

"(Witness continuing) (R. 74) Shortly after Chief "La Forte told me that Webster would dispose of a por- "tion of them; he was afraid that they would be lost or "stolen and he would bring them over and talk with "me about them. No funds had been placed at my dis- "posal by the Government——"

(R. 79)—"Q. In the affidavit which you verified on "the application for the appointment of a Receiver, "which I have here in my hands, you say that nobody "among the tribes, or any of them, so far as you were "able to learn, disputed Webster's individual ownership "of the wampums, is that a fact? A. I never heard it "disputed.

"Q. And you say—you assert—that no one beyond "Webster had any wampums, or claimed any right to "any? A. That is true, no one other than Webster claimed right to the wampums held by him."

If all of this were true it would not make any difference. To attempt to change the ownership of property by testimony that you "*never heard*" the individual ownership of another, who, so far as appears does not even claim it, "disputed" (R. 79) is a new idea.

It does not even appear that it was ever the subject of conversation except with one Indian. Why should they dispute it, if they were not asked.

And that "no one other than Webster claimed right "to the wampums held by him" (R. 79) is entirely consistent with his being wampum-keeper—besides, it does not appear that it was ever the subject of conversation, except with one Indian.

But, we turn from General Carrington the interested witness in 1898 to General Carrington the sworn public

officer in 1890 evidently proud of his position—and of the responsibility imposed upon him and proud to do his duty.

He says of himself (R. 90): "Considering the fact "that no correct census embracing their actual con- "dition *had ever been made up to 1890, great care was* "*taken in laying out the details of the work for a census* "*and* IN SELECTING THE AGENT TO EXECUTE IT."

There is this in his testimony (R. 77):

"Q. During that time, or at any other time, did Daniel "LaForte say to you that Thomas Webster held any "official position as wampum keeper, or otherwise? A. "No; *Mr. Webster called himself wampum-keeper*, be- "cause he was the only man that had the wampums and "kept them, and so cherishing the tradition as wampum- "keeper, *and I treated him in my report as wampum-* "*keeper*, BUT I DID NOT KNOW HIM OFFICIALLY AS SUCH. "Daniel LaForte treated Webster as tradition treats a "person who collects postage stamps and such things, "and as such is the possessor of national or family associa- "tion."

Italics and capitals mine.

Because, therefore, General Carrington "did not know him" (Webster), "*officially*"—whatever that may mean —as wampum-keeper, *therefore* he was not wampum-keeper.

The above is all the evidence which can possibly be construed to be in support of the finding.

And this is his report:

1.—There are the portraits of the "Officers of the League of the Iroquois in the United States" (facing page 103)—the second of the three is—"Thomas Webster "(Ha-yah-du-gih-wah), 'Bitter Body' KEEPER OF THE "WAMPUM. Snipe Tribe Onondaga."

Capitals mine.

2. (R. 104).

"ANCIENT AND MODERN GOVERNMENT, PROVISIONS AND INCIDENTS:

"The Iroquois league had its democratic and republican "elements, but the separate national governments were "essentially oligarchic. *The only semblance of written "law was the wampum. It was the duty of the 'keeper "of the wampums' to store all necessary facts in his "memory and associate them with the successive lines "and arrangements of the beads so that they could read- "ily be called to mind. At general councils the wam- "pums were produced, solemnly expounded, and made "reminders of history and duty.*

"'*Reading the Wampums became, therefore, a means "by which to perpetuate treaties, and the exchange of "wampums was an impressive occasion. Both the "Canadian and New York divisions of the Six Nations "retain as national heirlooms these evidences of the "chief facts in their national life.*

"*The Onondagas retain the custody of the wampums of "the Five Nations, and* 'THE KEEPER OF THE WAMPUMS,' "*Thomas Webster, of the Snipe tribe, a consistent, "thorough pagan, is their interpreter.*"

Italics mine.

(R. 105) "There are eleven of these historic wampums, "each fraught with traditional story of persons and events.

"*Daniel LaForte, who has been chairman or presi- "dent of the league, and also of the Onondagas, and "elsewhere referred to, still insists that the wampums, "as expounded by Thomas Webster, 'are government "enough for the Nation, and lay down all the rules of "duty that are needed.*

"The fact that the people can have no key to their own "laws, and that the *dictum* of the wampum reader is

"binding, just as his memory or interpretation of the "emblem shall dictate, seems to weigh little with the "pagan party."

"3. The old or pagan element among the Onondagas, "supported by Chief Daniel LaForte, *Thomas Webster*, "KEEPER OF THE WAMPUM, and others, maintained that "their rights to lands in Kansas and similar rights rested "upon treaties made between the Six Nations (exactly "six) and the United States, *and at a general council held "in 1888*, the Saint Regis Indians were formally recog- "nized as the successors of the Mohawks, thus restoring "the original five, while, with the Tuscaroras, maintain- "ing six. The theory was that an apparent lapse from "the six in number would in some way work to their "prejudice" (R. 110).

Italics and capitals mine.

4. And at page 111 he speaks of "*Chief* Theodore" (misprint, *Thomas*) "*Webster*, KEEPER OF THE WAMPUM," as bearing his years with dignity.

Italics and capitals mine.

5. As for Daniel LaForte treating "Webster as tra- "dition treats a person who collects postage stamps and "such things and as such is the possessor of national or "family association" (R. 77)

Contrast the Census Report (R. 105): "Daniel Laforte, "who has been chairman or president of the league, and "also of the Onondagas, and elsewhere referred to, still "insists that the wampums, *as expounded by* THOMAS "WEBSTER, *are government enough for the Nation, and "lay down* ALL *the rules of duty that are needed.*

"The fact that the people can have no key to their "own laws, and that the *dictum* of the wampum reader "is binding just as his memory or interpretation of the

" emblem shall dictate, seems to weigh little with the " pagan party."

Italics and capitals mine.

And the defendant has put in the statement of Daniel Laforte, made August 30, 1897, and procured *ex parte* by the defendant himself through Sanborn, in which Daniel LaForte calls Thomas Webster "*the* Wampum Keeper" (R. 125).

BAPTISTE THOMAS, the treasurer of the nation, gave the list of wampum keepers from the end of Mr. Clark's list (R. 144).

Nobody denies any of this.

III.—The Appellate Division said (R. 178):

" While we should not be prepared to give our assent " to all these findings, upon the evidence, as original " propositions, yet we need not go into the details of " the conclusions arrived at, inasmuch as the ownership " of the belts by Webster is found upon adequate evi- " dence, and that defeats all claim of title thereto by " the University of the State of New York under the " pretended transfer to it in 1898. *There is proof of* " *Webster's ownership of the belts, in the fact of his pos-* " *session thereof, independent of any proof of his having* " *been a wampum keeper, for years prior to his transfer* " *thereof in 1891.*"

Italics mine.

That is—in an action of ejectment—the plaintiff having proved his title, and the possession *necessarily* being in the defendant, the defendant has a right to go to the jury upon the fact—*his possession being evidence of ownership*—and a verdict in his favor will stand.

"When the custody and possession of property is "shown to be equally consistent with an outstanding "title in a third person as with a title in one having "possession, no presumption of ownership arises simply "from such possession."

The Court of Appeals of New York, speaking by Judge Allen, in *Rawley* v. *Brown*, 71 N. Y., 85, 89.

Now, Webster was either wampum keeper, or he was not. *If he was*, then he was a simple custodian, with a duty and a trust, to take care of the property for all of the Ho-de-no-sau-nee. For instance: one of these wampums is the Indian record of the *first* treaty made between the Six Nations and the United States—made by General Washington himself. The white man's counterpart of that treaty exists at this day in English words, written on parchment, in the possession of one John Hay, in Washington City. Now, suppose John Hay, Secretary of State of the United States, were to sell me that white man's counterpart for eighty-five dollars, and the United States were to sue me for it, would John Hay's possession be any evidence to support a judgment in my favor?

If Webster was *not* wampum keeper, then he was simply in possession of the property of others, and his possession is presumed to be the possession of the real owner, and not any evidence of title in him.

Lowery v. *Erskine*, 113 N. Y., 52, 58, 61.

There is not the slightest evidence of any claim of ownership by Webster except the fact of his sale of the wampums.

V.

As to the want of a demand.

This is one of the grounds upon which Mr. Justice Hiscock decided the case.

I.—*The filing of the bill in equity was equivalent to a demand.*

The rule requiring a demand applies only to the common law actions of replevin in the *detinet* and trover, in other words to a conversion.

This is a bill in equity (R. 159).

Where such a bill is filed, if the defendant, by his answer, claims title in himself, the filing of the bill, is, of itself, a sufficient demand.

Ayer v. *Ayer*, 16 Pick., 327, 335:

"No demand on the husband was necessary; for it appears by his answer, that he has denied her right, "which dispenses with a demand; if otherwise, it would "be necessary."

Heard v. *Lodge*, 20 Pick., 53, 61:

"The legitimate object of a demand is to enable the "party to perform his contract or discharge his liability, "agreeably to the nature of it, without a suit at law, and "whenever one party wholly denies the right of the other, "a demand must be useless. The rule in chancery seems "to be, that if the defendant in his answer denies the "right of the plaintiff, he cannot also insist in his defense "that there was no legal demand, as was held in *Ayer* v. "*Ayer*, 16 Pick., 327."

The defendant, in his answer, has denied the right of the plaintiffs (R. 20, 24).

II.—*Whenever one party wholly denies the right of the other demand must be useless.*

Heard *v.* Lodge (above), 20 Pick., 53, 61;
Fall River *v.* Riley, 138 Mass., 336, 340;
9 Amer. & Eng. Enc. of Law, 2d ed., 209;
Moore *v.* Craig, 4 N. Y., Supp., 340.

In this case the defendant has at least twice unqualifiedly asserted his own title (R. 4, 5, 21, 22).

III.—*In order to entitle himself to a demand the defendant must affirmatively, and as matter of defense, show that he purchased for value and without notice. He has not done so.*

Barrett *v.* Warren, 3 Hill, 348, 351.

"But although the defendant said he had bought the "mare, he gave no evidence of that fact, nor did he show "how he came to the possession of the property. He "may, for aught that appears, be a trespasser on a tres- "passer. I think it was enough for the plaintiff to show "the original wrongful taking. *That threw the burden* "*upon the defendant of showing that he came into pos-* "*session of the property by purchase or bailment, and* "*without fault on his part.*"

In *Pierce* v. *Vandyke*, 6 Hill, 613, this rule is restated and the court adds (p. 614): "If he (defendant) knew, *or* "*had any reason to believe that he was dealing with one* "*who acquired the property unlawfully*, he may then be "treated as a wrong-doer, without any demand by the "true owner."

In *Ely* v. *Ehle*, 3 N. Y., 506, the court held the same thing, and also held that the matter of justification or excuse *must be pleaded* (pp. 510–111); the court saying (p. 509): "Having proved the original tortious taking the

" cases referred to assert the principle *that it then lies on* " *the purchaser or bailee*, in order to protect himself from " liability as a trespasser, *to show that he came to the* " *possession of the property for a lawful purpose and* " *in perfect good faith*, by delivery from the wrong-doer. " That being proved, and that he had been guilty of no " fault, he would be protected against a liability, as a " tortious taker of the property, although, even in that " case, he would be answerable to the owner for the prop- " erty, in trover or replevin in the *detinet* after demand " and refusal to deliver."

And at page 511 they hold this must be pleaded.

In *Tallman* v. *Turck*, 26 Barb., 167, the same rule is stated and the court concludes (p. 172): "This rule requires " demand of the defendant to be proved, only AFTER *he* " *has established the fact that he purchased in good* " *faith* AND *for a valuable consideration.* The latter " was not proved and so the demand was unnecessary."

All italics and capitals in this division mine.

The defendant has alleged and proved the payment of the valuable consideration all right, *but he has neither alleged* (*R. 20*) *nor proved the want of notice.*

1.—The wampums came to Albany the *fifth* of March (R. 132). Sanborn, who received them, knew perfectly well what they were, for, on the *seventh* of March he sent back the receipt which described them (R. 132, 133).

They remained in Albany until the *twenty-fourth* of March—more than two weeks—when the defendant made his cheque for them (R. 117).

If the defendant then knew what Sanborn is shown by his letter and receipt to have known, *he knew that no title could have been given without a Six Nation Council.* Sanborn was all this time under his employ and subject to his orders.

By all rules of law Sanborn's knowledge was his knowledge, the law presuming that Sanborn told him.

It was therefore incumbent upon him to show that he did *not* know.

He has not done so.

2.—Dr. Crane supposed that he was selling the wampums to the State of New York (ante p. 70–71). Perhaps he would not have sold them to the defendant.

The defendant's justification is that there was no appropriation. The two appropriations made by Chapter 236, Laws 1892, and Chapter 188, Laws 1893, are general in their character. They contain no limitation whatever upon the power of the managers; and under them the defendant had the spending of *six hundred thousand dollars, and he spent it all.*

To face p. 72 *above*, is the photograph of a picture which he found it in his conscience to buy.

But after the passage of Chapter 497, Laws 1893, there could have been no possible doubt as to the power.

Under that act the managers turned over to the State Museum property worth about one hundred thousand dollars—"World's Columbian Exposition Report," signed by defendant (Senate document 86 of 1894, p. 151), and see picture which he bought—to face page 72, ante.

Under the rule above referred to, it is for the defendant to show that these things are not so.

IV.—In the common law actions of trover and replevin, both of which were, of course, actions sounding in tort, in which the defendant's body could have been taken in execution, it was necessary to a recovery to show a *conversion* of the chattels.

Demand and refusal were *evidence* of a conversion, but *they were not anything else nor more.* If the conversion were established by other evidence, there was no need of

proving a demand. *Kelsey* v. *Griswold*, 6 Barb., 436, 440; *Hill* v. *Covell*, 1 N. Y., 522, 524.

There is no case which holds that a demand is necessary as a prerequisite *to any other sort of action*, and this action is not either of those sorts.

But let us suppose that we have to prove a conversion.

Boyce v. *Brockway*, 31 N. Y., 490, was this: Defendant received at his warehouse in Catskill a sleigh load of firkins of butter, some of which were his and some were plaintiffs'. He shortly afterwards shipped the whole, by a steamboat, to New York. There was no evidence that he sold them or did anything else with them, on the contrary there was evidence that he sold his own, and that he did *not* sell the plaintiffs'.

The court said, speaking by Mr. Justice Davis (p. 492):

"The defendant gave evidence tending to show that he "received the butter in question in good faith, supposing "it to be his own, and *without any knowledge that it be-* "*longed to plaintiffs*. He requested the court to charge "that '*in that case* if he took the same care of it as "'his own, and it was lost without his fault, this action "'was not sustained.' The charge as requested would "have been proper if the defendant had, under such cir- "cumstances, simply received the butter and stored it in "his warehouse. Such an act would not have been the "exercise of such dominion over it, as would amount to a "conversion without proof of a demand and refusal. "There would be no sufficient assumption of ownership "by a mistaken acceptance of the property so delivered, "to render him chargeable for any relation beyond that "of bailee; but quite a different question arose when he "shipped the butter to New York *as his own*. That was "an assumption of dominion, which, whether founded "on mistake or not, was in hostility to the ownership of

" the plaintiffs. The law on this subject is well settled. " The proof, says Brown, *J.*, in *Cobb* v. *Dows* (9 Barb., " 242), 'need not show a tortious undertaking, or that " ' the defendant acted in bad faith. If it should appear " ' that they obtained the goods fairly from a person whom " ' they had reason to think was the true owner, or if they " ' acted under a mistake as to the plaintiff's title, or, " ' under an honest but mistaken belief that the property " ' was their own, they would still be liable to plaintiffs if " ' their acts in regard to it amounted to a conversion. If " ' they have taken it into their own hands, or disposed " ' of it to others, or exercised any dominion over it what- " ' ever, they are guilty of a conversion, and their liability " ' to plaintiffs is established.' This exposition of the law " is fully sustained by the authorities. (*Perkins* v. " *Smith*, 1 Wils., 328; *Everett* v. *Coffin*, 6 Wend., 603; " *Williams* v. *Merle*, 11 *id.*, 80; *Saltus* v. *Everett*, 20 " *id.*, 267; *Hoffman* v. *Cason*, 22 *id.*, 285; *Cowell* v. " *Hill*, 4 Denio, 323; *Allen* v. *Crary*, 10 Wend., 349; " *Murray* v. *Burliug*, 10 Johns, 175; *Schroeple* v. " *Corning*, 5 Denio, 240 *Connah* v. *Hall*, 23 Wend., " 462)."

" A wrongful intent is not an essential element of the " conversion. It is enough in this action that the " rightful owner has been deprived of his property by " some unauthorized act of another assuming dominion " or control over it."

Boyce v. *Brockway* (31 N. Y., 490) has been often approved.

Pease v. *Smith*, 61 N. Y., 471, 481;
Robinson v. *Chemical Bank*, 86 N. Y., 404, 407;
Simon v. *Simon*, 38 App. Div., 85, 87.
Lovell v. Shea, 60 Sup. Ct., 412, 414.

In *Pease* v. *Smith*, 61 N. Y., 477, the Commission, speaking by Dwight, Commissioner, said (p. 481):

"The principle is well stated by Alderson, B., in "*Fouldes* v. *Willoughby* (8 M. & W., 540): "'Any "'asportation of a chattel for the use of the defendant "'or a third person amounts to a conversion, for this "'simple reason, that it is an act inconsistent with the "'general right of dominion which the owner of a "'chattel has in it, who is entitled to the use of it at all "'times and in all places.'" And then he goes on to quote with approval the latter part of the language last quoted from *Boyce* v. *Brockway* (31 N. Y., 490).

In this case the defendant sent the wampums to Chicago *as his own*. He not only did that, but he there publicly exhibited them, conspicuously, at the World's Fair, and as his own property (R. 5, 4); and he signed a report to the legislature in which he states that the Hi-a-wat-ha belt is "now in the possession of Hon. John Boyd "Thacher, of Albany."

So he must have brought them back to Albany.

And he has since been distinctly and publicly asserting his ownership (R. 4, 5, 20) ever since.

So he must have brought the wampums back to Albany *as his own*.

V.—I have tried to show above that if Mr. Thacher is to have a right to a demand because he bought in good faith—that is *without notice*—he must plead and prove it.

Tallman v. *Turck*, 26 Barb., 167, 172.
Ely v. *Ehle*, 3 N. Y., 506, 510–511.
Pierce v. *Van Dyck*, 6 Hill, 613, 614.
Barrett v. *Warren*, 3 Hill, 348, 351 (quoted above p. 124).

Mr. Delahanty said in his second brief in the court below (p. 12) speaking of Mr. Sanborn's letter to Dr.

Crane, which contained the receipt (R. 132–134)—"The "date 'March 7th' is evidently a clerical error for "'April 7th,' 1893." Let us suppose this to be so, and see where it puts Mr. Sanborn. The money had gone to Dr. Crane on the 24th March, and *Mr. Sanborn knew it had gone, because he sent it* (R. 117). If the date of this letter be April instead of March, he is here deliberately telling Dr. Crane that he has sold his wampums to *the State of New York, and is inducing him to sign a receipt for the money from the State of New York, when he knew the contrary.* But it is plain that the date of the letter is correct, because it says that the money had not been received (R. 132, 133)—whereas, if the date were April, the money would have been gone *two weeks before the letter.*

They bought for the Columbian Exposition the portrait of the then Lieutenant-Governor—and the other long picture (to face page 72 *supra*), nobody knows what it is about, which hang in Senate's hall. On the day before Mr. Thacher made his cheque Mr. McNaughton paid out $419.36 for bills paid in "General, Women's, Forestry "and Indian (Ethnology) exhibits, and on the *same* day "Fine Arts $1250." World's Fair Report (Senate Doc. 86 of 1894), p. 595, and there is a statue of Hendrick Hudson and other *statues* in the Capitol which they bought, and turned into the State Museum as part of the "property worth about one hundred thousand dollars," *supra*, p. 126. If they could buy these things, *why not the wampum records?*

In saying this I submit that I am not travelling out of the record—I have a right to test the meaning of the appropriation act by what they did under it.

But the great evidence of want of good faith is this. Both Mr. Thacher and Mr. Sanborn knew perfectly well what they were buying. There is abundant proof of this

over their own signature—besides their extreme eagerness to get them.

If they had any information or any reason to believe that a Six Nation council, or even a council of the Onondagas had ever authorized their sale, *why have they not proved it?—and if he was honest in his belief that he had no right to use the State's money, why did he not take it when the State offered to reimburse him?* (R. 22–24).

The want of such proof is fatal to Mr. Thacher's right to a demand.

Assuming that a prior demand is necessary to support the action in the recovery of the possession, it is not necessary for the other relief

This Mr. Justice Hiscock himself admits (R. 160).

VI.

There was a sufficient demand.

It is printed at page 126—and was authorized by the written direction of seven chiefs, one less than a quorum, it is true, but one of them was *the president* (R. 152, 125).

As the wampum-keeper had died two months before (R. 61), the only executive officer who could act was the

president, and unless he could make a demand the statute might run, which would be absurd.

The president of any sort of corporation has such power by virtue of his office.

Morse on Banks and Banking, § 143b.
17 Amer. & Eng. Ency. of Law, 131.

The defendant cannot, under the circumstances, *now* raise the question of Mrs. Converse's *authority*.

Moore *v.* Fargo, 112 Mass., 254, 258.
Phelps *v.* Gilchrist, 28 N. H., 266.

VII.

The Statute of Limitations.

Of course, if the Indian plaintiffs cannot sue, there is no question about the statute, because there never was anybody, until February, 1898, when the university was elected wampum-keeper, who had capacity to sue.

But otherwise:

In the first place it must be assumed that we have got a cause of action.

I.—In the next place let us assume that the cause of action accrued when Webster sold, or attempted to sell, the wampums to General Carrington on the tenth of February, 1891.

Assuming also that Mr. Thacher can tack to his time the time of the possession of the wampums by General Carrington and Doctor Crane, and assuming that the action was begun when the new plaintiffs were brought in on the twentieth of December, 1898, the case stands this way:

Section 401 of the Code of Civil Procedure of New York contains the following:

"Section 401. If, when the cause of action accrues "against a person, he is without the state, the action may "be commenced within the time limited therefor, after "his return into the state. If, after a cause of action "has accrued against a person, he departs from the state "and remains continuously absent therefrom for the "space of one year or more, or if, without the knowl- "edge of the person entitled to maintain the action, "he resides within the state under a false name, the "time of his absence or of such residence within the "state under such false name is not a part of the time "limited for the commencement of the action."

The cause of action accrued against General Carrington tenth of February, 1891 (R. 76).

The action was begun twentieth of December, 1898 (R. 27).

Seven years, ten months, ten days. 7 y. 10 m. 10 d.

General Carrington left the State tenth of April 1891 and was out of it, except that he spent a week in Saratoga in July, 1892, until he delivered the wampums to Docter Crane. (Letters of 2 January 1899 and 16 March 1899 (R. 84–87). He thus was out of the State continuously for more than a year. He went from Saratoga to

Hyde Park and delivered the wampums to Doctor Crane. Doctor Crane resided in Boston and Florida until he died, and the cause of action against him arose when he was out of the State and he never came into the state afterwards. (Letters of 2 January 1899 and 16th of March 1899 (R. 85–87).

Mr. Thacher's cheque is dated the 24th of March, 1893 (R. 117), and it went to Dr. Crane in Florida (R. 117). A cause of action could not therefore possibly have accrued against Mr. Thacher until the twenty-fourth of March, 1893.

Deduct the time between the tenth of April 1891 when General Carrington left the state and the twenty-fourth of March, 1893 when a cause of action arose against Mr. Thacher. 1 y. 11 m. 14 d.

5 y. 10 m. 24 d.

Add seven days when General Carrington was in Saratoga..... 7 d.

31 d.

and the result is..... 5 y. 11 m. 1 d.

In Bennett *v.* Cook, 43 N. Y., 539, there had been a verdict for the plaintiff and there was evidence, which went to the jury, that the defendant had been in New York not more than ten of the twenty-four hours of each day—the other hours in New Jersey. The court held that fourteen hours of each of those days must be deducted from the time of the statute.

The statute of limitations is a defence, which must not

only be pleaded, but the facts to establish that defence must be *proved*.

Cole *v.* Jessup, 10 N. Y., 96, 104.

So that the statute has not run even upon that theory.

II.—*But that is not the correct theory.* The action was in fact begun 9th of October, 1897 (see defendant's appearance, R. 154). And since the action was brought as a representative one, the statute runs against the inividuals brought in on the twentieth of December, 1898, *as if they had been in at the beginning of the action.* (*Brinckerhoff* vs. *Bostwick*, 99 N. Y., 185, 194.)

Mr. Delehanty stated, in his brief in the court below, in regard to this matter, that at the time those "who now "assume to be the plaintiffs were brought into the case" ("22 December, 1898,") "Te-hes-ha, the other plaintiff, "*was dead*" (Brief, p. 43).

In regard to this as to much of the other statements of fact in Mr. Delehanty's briefs below, there should be said what Parkman said of Henry Schoolcraft in regard to these very Ho-de no-sau-nee and these very wampums.

"; but here, as in all "Mr. Schoolcraft's productions, *the reader must scru-* "*pulously reserve his right of private judgment.*"

"The Jesuits in North America," Champlain ed., Boston, 1897, 1, 45, note.

Italics mine.

Te-hes-ha was *not* dead when the other plaintiffs were brought in (R. 59, 61), whether he has died since does not appear, nor is it of the slightest consequence.

Until his death be suggested to the court the case will go on just the same whether he be alive or dead. When his death has been suggested to the court his personal representatives will come in and the case will also go on just the same.

III.—*No cause of action accrued in favor of anybody, until the 10th February, 1891.*

If Webster was wampum-keeper he had the right to the possession of the wampums as against all the world—at any rate until the Onondaga Nation turned him out of that office.

If he was not wampum-keeper—then, until there was an assertion, ON HIS PART, *of ownership in* himself, of the wampums, *to the knowledge of the plaintiffs*, the statute did not begin to run.

If he was not wampum-keeper he must have been either bailee, agent, a tenant in common with the other Indians of the Ho-de-no-sau-nee—or a total stranger.

If he was bailee or agent his possession was the possession of his bailor or principal until he openly repudiated his trust.

If his possession was as tenant in common with the others of the Ho-de-no-sau-nee, then no action would lie against him; not even by all the rest put together.

Russell v. *Allen*, 13 N. Y., 173.
Le Baron v. *Babcock*, 122 N. Y., 153, 157.

If he was a total stranger, then the statute would not begin to run until he asserted his ownership, his possession until then being deemed in law to be the possession of the real owner (*Duryea* v. *Andrews*, 34 State Rep., 774); nor then, though he openly asserted his ownership, unless it was proved that *notice* of that assertion had come to the plaintiffs.

In *Mayor, &c., of N. Y.* vs. *Lent and Others*, 51 Barb., 19, the report says (p. 19): "The action was brought to "recover possession of an autograph letter, written by "General Washington, and addressed to the plaintiffs, in "1785, and which, in May, 1864, was sold at auction by "the defendants, composing the firm of Bangs, Merwin & "Co., to the defendant Lent.

"It appeared in evidence, that John Allan, in the year "1864, was in the possession of the letter, and that it con- "tinued in his possession until November 1, 1863, when "he died, and the possession thereof passed to Margaret "Stewart, his executrix, by whom it was placed in the "hands of the above-named auctioneers, to be sold at pub- "lic auction, and it was sold by them to Lent, for the sum "of $2,050."

It was proved that the letter was written in answer to a vote by the common council of the freedom of the city, and that the letter had been read at a meeting of the common council on the second of May, 1785; and that John Allan "was a collector of rare manuscripts and literary "curiosities; that he had a large collection of such arti- "cles; that at the time of his death, in 1863, he had been "in possession of the letter for thirty years and upwards, "exhibiting it to various persons from time to time, as his "own" (p. 29). The Court said (p. 27): "No notice is "shown to have been at any time given to the corporation "of the possession by Allan. Had such notice been "shown, the statute of limitations by appropriate lapse "of time might have had application." (The statute was properly pleaded, Gen. Term Cases, Bar Asso., vol. 77 of 1868, case 26, fol. 27.)

VIII.

Equity has jurisdiction.

Duke of Somerset vs. *Cookson*, 3 P. Wms., 390. Bill in equity to compel the delivery in specie and undefaced of an old altar-piece of silver, "remarkable for a Greek "inscription and dedicated to Hercules."

The defendant demurred, for that there was remedy at law.

Complainant urged that it "was matter of curiosity "and antiquity, and though at law only the intrinsic "value is to be recovered, yet it would be very hard that "one who comes by such a piece of antiquity by wrong, "or it may be as a trespasser, should have it in his power "to keep the thing, paying only the intrinsic value of it; "which is like trespassers forcing the right owner to "part with a curiosity, or matter of antiquity, or orna-"ment, *nolens volens*. Besides, the bill is to prevent the "defendant from defacing the altar-piece, which is one "way of depreciating it." And the law being defective in "this particular, such defect is properly supplied in "equity." (Lord Chancellor Talbot.)

Pusey v. *Pusey*. Bill was that a *horn*, which time out of mind had gone along with the plaintiff's estate, and was delivered to his ancestor's in ancient time to hold their land by, might be delivered to him; upon which horn was this inscription, viz.: *pecote this horn to hold thy land*. (1 Vern. 283, 20 Nov. 1684 Lord Keeper Rosslyn.)

Fells v. *Read*, 3 Ves., 70. A club consisted of persons who had served the office of Overseer of the poor of St. Margaret's Parish. This club had been for a long time "in possession of a silver tobacco-box inclosed in "two large silver cases, all of which were adorned with "several engravings of public transactions and heads of

"distinguished persons. The date of the box did not "appear in the cause; but the ornaments, which had "been added by different overseers during the time the "box and cases remained in their custody, began in the "year 1713. This box and the cases were always kept "by the overseer for the time being; who upon coming "into office received them from the churchwarden with a "particular charge, in which he was enjoined, under a "penalty, to produce them at all meetings of the society, "and to deliver them upon going out of office to the "senior churchwarden, to be by him delivered to the suc-"ceeding overseer."

This box was as usual delivered to the defendant Reed when he became overseer. When his term was out he refused to deliver the box unless the vestry of the Church passed his accounts. Thereupon two members were directed at a meeting to bring an action, which they did, *but afterwards released to Reed.*

Lord Loughborough said: "The value I cannot meas-"ure. The Pusey horn, the Patera of the Duke of Som-"erset, were things of that sort of value, that a jury "might not give two pence beyond their weight."

Lloyd v. *Loaring*, 6 Ves., 773; Bill by three of the Caledonian Lodge of Free Masons for the delivery, "un-"injured and undefaced" (p. 775) of the dresses and "decorations, and the books and papers, tools and im-"plements, and other goods and effects of the said "chapter," including "the original warrant or charter "granted to them by the grand or head charter of Royal "Arch Masons; by which the Caledonian Chapter is con-"stituted or authorized and continued" (pp. 774, 775).

Lady Arundell v. *Phipps and Taunton*, 10 Ves., 139: "family pictures and furniture."

By Lord Eldon: (p. 148) "and this Court having in "many instances interposed to protect the enjoyment of

"a specific chattel, the question is whether the very "object and subject of the contract do not make it neces- "sary to consider whether the Court cannot give the "specific relief of fixing in the trustees the very property, "instead of the amount in damages."

Nutbrown v. *Thornton*, 10 Ves., 159: "Order specifically "to restore to a tenant the stock, &c., on the farm, "seized by the landlord under a distress and bill of sale; "jurisdiction for specific delivery of a chattel, the value "of which is not to be estimated by damages."

Lord Eldon (p. 163) "I had not forgot the case of the "*Pusey Horn* (Pusey *v.* Pusey, 1 Vern., 273), which "turned upon the *pretium affectionis;* independent of "the circumstances as to tenure; which could not be "estimated in damages. As to *Fells* v. *Brown*, the ob- "jection to which no answer was given, was, who were "the *cestuys que trust?* Individuals sued, who did not "pretend to say the box belonged to them. The overseers "were gone. Lord Rosslyn, however, thought he saw a "trustee and a *cestui que trust;* and those got the chattel "who ought to have had it. But this is the case not of "a single chattel, unconnected, but of a great variety of "chattels, which must be held upon a trust together "with the estate. There is, therefore, a *cestui que trust.* "Upon the particular circumstances also, the Court "would be justified in interposing to prevent the destruc- "tion of the property, until the rights were ascertained, "upon the principle of irremediable mischief. It is said "the Plaintiff might have damages. But how are damages "to be ascertained in such a case? The direction to a "jury must be to give, not the value of these chattels "merely, but their value to this man, having this farm, "enabling him to use them for the purpose of cultivation.

Earl of Macclesfield v. *Davis*, 3 Ves. & B. 16; Plate,

jewels, etc., bequeathed as heir looms, kept in a locked iron chest.

Lord Eldon (p. 18), "It is now too late, since the case "of *Fells* v. *Reed*, 3 Ves. 70, following *Pusey* v. *Pusey*, "1 Vern. 273, to discuss, whether this Court will inter- "fere for the specific delivery of a chattel; and, if it will "in such a case, *a fortiori* the restitution of heir-looms "must be decreed; upon which there never was any "doubt."

Lowther *v.* Lord Lowther, 13 Ves. 95; A painting (by Lord Erskine).

Osborn v. *Bank of United States*, 9 Wheat. 738, 845: "We think it a case in which a Court of equity ought to "interpose, and that there are several grounds on which "its jurisdiction may be placed.

"One, which appears to be ample for the purpose, is, "that a Court will always interpose, to prevent the trans- "fer of a specific article, which, if transferred, will be "lost to the owner." (Gives instances of negotiable securities and transfer of stock.) "In these cases the "injured party would have his remedy at law; and the "probability that this remedy would be adequate, is "stronger in the cases put in the books than in this, "where the sum is so greatly beyond the capacity of an "ordinary agent to pay. But it is the province of a Court "of equity, in such cases, to arrest the injury, and pre- "vent the wrong. The remedy is more beneficial and "complete, than the law can give." To restrain the State Treasurer of Ohio from parting with $100,000 in specie which had been taken by a tax collector from the Bank of the United States.

Pattison *v.* Skillman, 34 N. J. Eq. 344: "This c[illegible] "has jurisdiction to enforce the restitution or delivery of "a specific chattel which has a peculiar artificial value,

" and for which, therefore, adequate compensation cannot " be obtained at law; and that, too, whether possession " has been got by the wrong-doer through a trust or not" (p. 347).

Letters, power of attorney, receipt and written testimony of witnesses.

Brigham *v.* Home Life Insurance Co., 131 Mass. 319; Policy of insurance.

Hill *v.* Rockingham Bank, 44 N. H., 567; Certificates of stock.

Individual slaves.

Dudley *v.* Mallory, 4 Geo. 52, 66–67.
Loftin *v.* Espy, 4 Yerg. 84.
Henderson *v.* Vaulz & wife, 10 Yerg. 30, 37–38.
Murphy *v.* Clark, 1 Smedes & M. 221, 233–236.
Butler *v.* Hicks, 11 Smedes & M., 78.

IX.

The Court has jurisdiction.

In *Eustis* v. *Bolles*, 150 U. S. 361, the Court, speaking by Mr. Justice Shiras, said (p. 366):

" It is settled law that to give this court jurisdiction of " a writ of error to a state court, it must appear affirma- " tively, not only that a Federal question was presented " for decision by the state court, but that its decision was

"necessary to the determination of the cause, and that it "was actually decided adversely to the party claiming a "right under the Federal laws or Constitution, or that "the judgment as rendered could not have been given "without deciding it. *Murdock* v. *Memphis*, 20 Wall. "590; *Cook County* v. *Calumet & Chicago Canal Co.*, "138 U. S. 635.

"It is likewise settled law that where the record dis- "closes that if a question has been raised and decided "adversely to a party claiming the benefit of a provision "of the Constitution or laws of the United States, another "question, not Federal, has also been raised and decided "against such party, and the decision of the latter ques- "tion is sufficient, notwithstanding the Federal question "to sustain the judgment, this court will not review the "judgment.

"In *Klinger* v. *Missouri*, 13 Wall. 257, 263, this court, "through Mr. Justice Bradley, said: 'The rules which "'govern the action of this court in cases of this sort are "'well settled. Where it appears by the record that the "'judgment of the state court might have been based "'either upon a law which would raise a question of "'repugnancy to the Constitution, laws, or treaties of the "'United States, or upon some other independent ground, "'and it appears that the court did, in fact, base its "'judgment on such independent ground and not "'on the law raising the Federal question, this court will "' not take jurisdiction of the case, even though it might "' think the position of the state court an unsound one. "' But where it does not appear upon which of the two "' grounds the judgment was based, then, if the indepen- "' dent ground on which it might have been based was a "' good and valid one, sufficient of itself to sustain the "' judgment, this court will not assume jurisdiction of "' the case; but if such independent ground was not a "' good and valid one, it will be presumed that the state

" ' court based its judgment on the law raising the Fed-
" ' eral question, and this court will then take jurisdic-
" ' tion.'

" In *Johnson* vs. *Risk*, 137 U. S. 300, the record " showed that, in the Supreme Court of Tennessee, two " grounds of defence had been urged, one of which in- " volved the construction of the provisions of the Federal " bankrupt act of March 2, 1867, and the other the bar of " the statute of limitations of the State of Tennessee; " and this court held that 'where, in an action pending " ' in a state court, two grounds of defence are inter- " ' posed, each broad enough to defeat a recovery, and " ' only one of them involves a Federal question, and " ' judgment passes for the defendant, the record must " ' show, in order to justify a writ of error from this " ' court, that the judgment was rested upon the disposi- " ' tion of the Federal question; and if this does not " ' affirmatively appear, the writ of error will be dis- " ' missed, unless the defence, which does not involve a " ' Federal question, is so palpably unfounded that it " ' cannot be presumed to have been entertained by the " ' state court.' "

In this case the decision of the Court of Appeals was *solely* on the Federal question, as the record affirmatively shows.

II.—And the jurisdiction of the Court turns wholly upon what *the Court of Appeals* did—what the courts below did does not matter.

Here is the text of the judiciary act:

R. S., 1878, p. 133.

"Sec. 709. A final judgment or decree in any suit *in* " *the* HIGHEST *court of a State*, in which a decision in the

"suit could be, had, where is drawn in question the valid-
"ity of a treaty or statute of, or an authority exercised
"under, the United States, and the decision is against
"their validity, or where is drawn in question the valid-
"ity of a statute of, or an authority exercised under
"any State, on the ground of their being repugnant to
"the Constitution, treaties or laws of the United States,
"and the decision is in favor of their validity; or where
"any title, right, privilege, or immunity is claimed
"under the Constitution, or any treaty or statute of, or
"commission held or authority exercised under, the
"United States, and the decision is against the title,
"right, privilege, or immunity specially set up or claimed
"by either party, under such Constitution, treaty,
"statute, commission, or authority, may be re-examined
"and reversed or affirmed in the Supreme Court upon
"writ of error."

It is the decision of the *highest* court of the State upon which the jurisdiction of the Court turns.

The judgment should be reversed.

AS-QUE-SENT-WAH
(EDWARD WINSLOW PAIGE,)
of Counsel.

APPENDIX.

Opinion Court of Appeals.

COURT OF APPEALS.

EUGENE A. JOHNSON,
Respondent,

v.

THE LONG ISLAND RAILWAY COMPANY,
Appellant.

(Decided April 17, 1900, 162 N. Y., 462.)

Appeal from an order of the Appellate Division, second department, reversing an interlocutory judgment which sustained a demurrer to the complaint.

Alfred A. Gardner and William J. Kelly for appellant.

Leman B. Treadwell and Francis M. Morrison for respondent.

BARTLETT, *J.:* This appeal is taken by permission of the Appellate Division, which certified three questions to this court: (1) Has the plaintiff in this action legal capacity to sue? (2) Is there a defect of the parties plaintiff in this action, in that the members of the alleged Montauk Tribe of Indians are not made parties plaintiff? (3) Does the complaint herein state facts sufficient to constitute a cause of action?

This is an action of ejectment brought by the plaintiff, a citizen of the United States of Indian

blood and lineage, and a member of the Montauk Tribe of Indians by right of birth and affiliation, on behalf of himself and all other persons equally interested with him, who may come in and contribute to the expenses of the action.

The demurrer contains a number of grounds stated in detail why the plaintiff cannot maintain this action.

The single question presented is, whether the plaintiff as a member of this tribe of Indians can maintain ejectment on behalf of the tribe in the form of action already described.

The Special Term sustained the demurrer to the complaint, but the Appellate Division, with a divided court and expressing the opinion that the plaintiff's right is not free from doubt, reversed the interlocutory judgment on the ground that this action is brought in accordance with the views expressed on a prior appeal.

Judge Willard Bartlett dissenting was of the opinion that the complaint in the present action was not framed in accordance with the previous decision.

The prior appeal referred to was the case of Montauk Tribe of Indians, by Wyandank Pharoah, their chief and king, against the present corporation defendant (28 App. Div., 470.)

In that case a demurrer was sustained to the complaint on the ground that the plaintiff had no legal capacity to sue, and the Appellate Division affirmed the interlocutory judgment to that effect.

Cullen, *J.*, who wrote the opinion of the Court, in which all the justices concurred, said: "It is not worth while to enter upon any discussion of the *status* of the Indian tribes within this State, as we think that on the question now before us we are concluded by authority. In Strong *v.* Waterman (11 Page, 607) it was held that, while the Indians

had the undoubted right to the beneficial use and occupancy of their lands, no provision had been made by law for bringing ejectment to recover possession of them; that as a body or tribe, the Indians had no corporate name by which they can institute such a suit."

The learned judge then pointed out that the same doctrine has been laid down in Seneca Nation *v.* Christie (126 N. Y., 122).

That was an action of ejectment brought by the Seneca Nation of Indians to recover certain lands in Erie county, and this court held that the right of the plaintiff to sue in that form was given by, and was dependent upon a statute, which was a special act for the protection and improvement of the Seneca Indians, residing on certain reservations in this state (Chap. 150, Laws 1845).

Judge Andrews, who wrote the opinion of the court, cites at this point the case of Strong *v.* Waterman (*supra*) undoubtedly to show that under the law of the state as it then stood, this action could not be maintained by the Indian tribe, except by the provisions of an enabling act.

In the case of Strong *v.* Waterman (*supra*) the action was brought by Strong and Gordon, chiefs of the Seneca Nation of Indians, against a white man for an injunction restraining him from committing trespasses and waste upon the reservation of the tribe and from interfering with its possession.

The immediate proceeding was a motion to dissolve this injunction. The chancellor, in the course of his opinion, states: "No provision, however, has been made by law for the bringing an ejectment to recover the possession of Indian lands in the Cattaraugus reservation. For the right to the possession is in several thousand individuals in their collective capacity, which individuals, as a body, have no corporate name by which they can insti-

tute an ejectment suit. * * * The Indians cannot, therefore, institute a suit in the name of the tribe; but they must sue in the same manner as other citizens would be required or authorized to sue for the protection of similar rights."

It was, therefore, held that the two persons named as complainants, having been authorized by the council of chiefs, might file a bill for an injunction, to which reference has been made to protect their possession. This was placed expressly upon the ground that if the common law furnished no sufficient protection of the rights of the tribe it is a part of the acknowledged jurisdiction of equity to interpose for its relief.

The learned chancellor evidently recognized a broad distinction between the rights of the tribe in defending its possession of lands and bringing ejectment to secure possession.

We have been cited to no statute nor to any controlling decision authorizing the present action.

The respondent has referred to certain sections of the Indian Law as tending to authorize this action, more particularly section 11 thereof, relating to trespasses on tribal lands, which provides that an action may be brought in the name of the People of the state against any person other than an Indian trespassing upon the tribal lands, by the district attorney of the county, or in the name of the nation, tribe or band, by any three of the chiefs, head men or councillors thereof, etc.

This section obviously has no application to the present situation, and substantially existed as section 8 of chapter 234 of the Laws of 1841, which was in force four years before the decision of Strong *v.* Waterman (*supra*). It is a clear recognition of the necessity for legislation in the premises at that early date.

In the opinion to which reference has already

been made, Judge Cullom said (28 App. Div. 472): "Still the Indians are not without redress. They may apply to the legislature for authority to maintain an action like the present, *or it may be* that, under the authority of Strong *v.* Waterman (*supra*), an action might be instituted by one of their number on his own behalf and on behalf of the other Indians of his tribe."

This is evidently the view expressed on the prior appeal, which led the Appellate Division, in the order we are reviewing, to hold that this plaintiff had legal capacity to sue.

It is to be observed that the learned judge, after referring to the undoubted right of the legislature to authorize the action, merely suggested that, under the authority of Strong *v.* Waterman (*supra*), it might be that an action like the present could be instituted. The expression is evidently intended as a view of the case, concerning which the writer was in doubt. As already intimated, we do not regard Strong *v.* Waterman (*supra*) as authorizing this action.

A decision holding that this action could be maintained either by the tribe, or an individual member thereof, on behalf of himself and all others who should come in and contribute, would be contrary to the policy and practice which have been long established in our treatment of the Indian tribes. They are regarded as the wards of the state, and generally speaking, possessed of only such rights to appear and litigate in courts of justice as are conferred upon them by statute.

It is conceded by the complaint in this action "that the tribe have no legal capacity to sue therefor and have no corporate name by which they can institute such a suit."

The theory of an action by one for the benefit of all is, that where a large number of persons, not

incorporated, are vested with a cause of action, it may be enforced in that manner, but when it is admitted, as in this case, that the tribe has no cause of action, it follows, logically, that no one member of the tribe could sue for the benefit of all, as the cause of action does not exist.

We are of opinion, however, that the Montauk Tribe of Indians are not without legal redress in the premises, as by an application to the legislature an enabling act can be obtained allowing action to be brought on behalf of the tribe, in the name of its chief or head, or in the name of such member or members thereof as may be selected.

It is much better that this course should be pursued than to sustain an action in the present form, which it is conceded by the learned court below is not free from doubt, and which we regard as contrary to long-established public policy.

We answer the three questions certified to us in the negative.

The order appealed from should be reversed and the interlocutory judgment affirmed, but, under the circumstances, without costs to either party in this court.

O'Brien, Haight and Martin, *JJ.*, concur, and Parker, *Ch.J.*, concurs in result; Vann and Landon, *JJ.*, dissent.

Order reversed, &c.

The Indian Law.

Chapter 679 Laws 1892.

"§ 2. POWER TO CONTRACT.—An Indian shall "be liable on his contracts not prohibited by law; "and a native Indian may take, hold and convey "real property the same as a citizen. Upon be- "coming a freeholder to the value of one hundred "dollars he shall be subject to taxation. No per- "son shall maintain an action on a contract against "any Indian of the Tonawanda nation, the Seneca "nation or Onondaga tribe, nor against any of "their Indian friends residing with them on their "reservations in this State, and every person who "prosecutes such an action shall be liable to treble "costs to the party aggrieved." (As amended by chapter 229, Laws 1893.)

"5. ACTIONS IN STATE COURTS.—Any demand "of right of action, jurisdiction of which is not "conferred upon a peacemakers' court, may be "prosecuted and enforced in any court of the "state, the same as if all the parties thereto were "citizens."

Certain Laws relating to the University of the State of New York.

Chap. 51.

AN ACT for granting certain privileges to the college heretofore called Kings College, for altering the name and charter thereof, and erecting an university within this State.

Passed the 1st of May, 1784.

WHEREAS by letters patent under the great seal of the late colony of New York, bearing date the thirty-first day of October, in the twenty-eighth year of the reign of George the second the king of Great Britain, a certain body politic and corporate was created by the name of the Governors of the College of the Province of New York in the City of New York in America, with divers priviledges, capacities and immunities, as in and by the said patent will more fully appear.

AND WHEREAS there are many vacancies in the said corporation, occasioned by the death or absence of a great number of the governors of the said college, whereby the succession is so greatly broke in upon as to require the interposition of the Legislature.

AND WHEREAS the remaining governors of the said college, desirous to render the same extensively useful, have prayed, that the said college may be erected into an university, and that such other alterations may be made in the charter or letters of incorporation above recited, as may render them more conformable to the liberal principles of the Constitution of this State.

BE IT THEREFORE ENACTED BY THE PEOPLE OF

THE STATE OF NEW YORK REPRESENTED IN SENATE AND ASSEMBLY AND IT IS HEREBY ENACTED BY THE AUTHORITY OE THE SAME, That all the rights priviledges and immunities heretofore vested in the corporation, heretofore known by the name of the Governors of the College of the Province of New York, in the city of New York in America, so far as they relate to the capacity of holding, or disposing of property either real or personal, or suing or being sued, of making laws or ordinances for their own government, or that of their servants, pupils and others, under their care and subject to their direction, of appointing, displacing, and paying stewards and other inferior servants, or making, holding and having a common seal, of altering and changing the same at pleasure, be and they hereby are vested in the regents of the university of the State of New York, who are hereby erected into a corporation or body corporate and politic, and enabled to hold possess and enjoy the above mentioned rights, franchises privileges and immunities, together with such others as are contained in this act, by the name and stile of the Regents of the University of the State of New York, of whom the Governor, the Lieutenant Governor, the President of the Senate for the time being, the Speaker of the Assembly, the mayor of the city of New York, and the mayor of the city of Albany, the Attorney General and the Secretary of the State respectively for the time being, be and they hereby are severally constituted perpetual regents, in virtue of their several and respective offices, places and stations, and together with other persons herein after named to the number of twenty four, to wit, Henry Brockholst Livingston and Robert Harpur of the city of New York, Walter Livingston and Christopher Yates of the county of Al-

bany, Anthony Hoffman and Cornelius Humfrey of the county of Dutchess, Lewis Morris and Philip Pell Junior of the county of Westchester, Henry Wisner and John Haring of the County of Orange, Christopher Tappen and James Clinton of the county of Ulster, Christopher P. Yates and James Livingston of the county of Montgomery, Abraham Bancker and John C. Dongan of the county of Richmond, Mathew Clarkson and Rutger VanBrunt of the county of Kings, James Townsend and Thomas Lawrence of the county of Queens, Ezra L'Hommedieu and Caleb Smith of the county of Suffolk, and John Williams and John McCrea of the county of Washington, be and they hereby are appointed regents of the said University, and it shall and may be lawful to and for the clergy of the respective religious denominations of this State, to meet at such time and place, as they shall deem proper after the passing of this act, and being so met shall by a majority of voices of those who shall so meet, chuse and appoint one of their body to be a regent in the said university and in case of death or resignation to chose and appoint another in the same manner and the regent so chosen and appointed shall have the like powers as any other regent appointed or to be appointed by virtue of this act. And to the end that a succession of regents be perpetually kept up.

BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That whenever and so often as one or more of the regents of the said university, not being such in virtue of his or their office, place or station, shall remove his or their place of residence from within this State, shall resign or die, that the place or places of such regent or regents, so removing, resigning or dying shall be filled up by the governor or person administering the government of the State for the time being, by and with the

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advice and consent of the council of appointment, so that such appointments be of persons resident in the counties respectively wherein in the former regents did reside, other than where such vacancy may happen of a regent appointed by the clergy as aforesaid.

AND BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That as soon as may be after the passing of this act, the regents of the said university, shall by plurality of voices, chuse a chancellor a vice chancellor a treasurer and a secretary, from among the said regents, the said chancellor or in his absence the vice chancellor to preside at all elections and other meetings to be held by the said regents, and to have the casting vote upon every division. And for the well ordering and directing of the said corporation.

BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That the regents of the said university, or a majority of them shall be and hereby are vested with full power and authority to ordain and make ordinances and bye laws for the government of the several colleges, which may or shall compose the said university, and the several presidents, professors, tutors, fellows, pupils and servants thereof and for the management of such estate as they may and shall be invested with; that they shall have full power and authority to determine the salaries of the officers and servants of the said college to remove from office any such president professor tutor fellow or servant, as they conceive, after a full hearing to have abused their trust, or to be incompetent thereto, provided, nevertheless, that no fine to be levied by virtue of the said laws or ordinances, shall exceed the value of one bushel of wheat for any one offence, and that no pupil or student shall be suspended for a longer term than twenty days, or be rusticated or

expelled, but upon a fair and full hearing of parties, by the chancellor or vice chancellor of the said university, and at least ten of the regents not being president or professors of the college to which the person accused belongs, or under whose immediate direction the same may be, and the said regents are hereby further impowered and directed as soon as may be, to elect a president and professors for the college heretofore called Kings College, which president shall continue in place during the pleasure of the regents of the university. And that from and after the first election, the said president and all future presidents shall be elected, from out of the professors of the several colleges, that may or shall compose the said university, and that no professor shall be in anywise whatsoever accounted inelligible, for or by reason of any religious tenet or tenets, that he may or shall profess, or be compelled by any bye law or otherwise, to take any religious test-oath whatsoever. And to the end that the intention of the donors and benefactors of the said beforementioned college be not defeated.

BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That all the estate whether real or personal, which the said governors of the corporation of Kings College held by virtue of the said beforementioned charter, be held and possessed by the said regents and applied solely to the use of the said college and that the said regents may and they hereby are empowered to receive and hold for the use of the said college, an estate of the annual value of three thousand five hundred pounds, in manner specified in the said first above recited charter or letters patent of incorporation. And for the further promotion of learning and the extension of literature.

BE IT FURTHER ENACTED BY THE AUTHORITY

AFORESAID, That the said regents may hold, and possess estates, real and personal to the annual amount of forty thousand bushels of wheat, over and above all profits arising from room rent or tuition money, and that whenever any lands tenements or hereditaments, or other estate real or personal, shall be given, granted or conveyed to the regents of the University of the State without expressing any designation thereof, such estate shall be applied in such manner as to the said regents shall seem most advantageous to the said university—provided always, that whenever any gift, grant, bequest, devise or conveyance shall express the particular use to which the same is to be applied, if adequate thereto, it shall be so applied and no otherwise.

AND BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That the said regents be and they hereby are impowered, to found schools and colleges in any such part of this State as may seem expedient to them, and to endow the same, vesting such colleges so endowed with full and ample powers to confer the degrees of bachelor of arts, and directing the manner in which such colleges are to be governed, always reserving to the chancellor and vice-chancellor of the university, and a certain number of the regents, to be appointed by a majority of the said regents, a right to visit and examine into the state of literature in such college, and to report to the regents at large any deficiency in the laws of such college or neglect in the execution thereof, every such school or college being at all times to be deemed a part of the university, and as such, subject to the control and direction of the said regents; and if it should so happen, that any person or persons, or any body politic or corporate, should at his or their expense found any college or school, and endow the same with an estate, real or

personal of the yearly value of one thousand bushels of wheat, that such school or college shall on the application of the founder or founders or their heirs or successors, be considered as composing a part of the said university, and the estate thereunto annexed shall be and hereby is vested in the said regents, of the university, to be applied according to the intention of the donor, and that the said founder and founders, and their heirs, or if a body corporate, their successors shall be and hereby are forever hereafter entitled to send a representative for such college or school, who together with the president (if the estate is applied to the use of a college) shall be and they hereby are at all times hereafter to be considered as regents of the said university, and vested with the like powers and authorities in all things, as in and by this act is given to the other regents of the said university and the said college or school, shall in all things, not particularly restricted by the donor, conform to the general laws and regulations of the said university, provided that nothing in this act contained shall be construed to deprive any person or persons of the right to erect such schools or colleges as to him or them may deem proper, independent of the said university.

AND BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That whenever any religious body or society of men shall deem it proper to institute a professorship in the said university for the promotion of their particular religious tenets, or for any other purpose not inconsistent with religion, morality and the laws of this State, and shall appropriate a fund for that purpose, not being less than two hundred bushels of wheat per annum, that the regents of the said university shall cause the same to be applied as the donors shall direct for the purposes abovementioned, the said professors so to be

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appointed to be subject to the like rules, laws and ordinances, as other professors of the said university, and entitled to the like immunities and privileges.

AND BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That the said regents and their sucessors forever, shall and may have full power and authority by the chancellor or vice chancellor of the said university, or any other person or persons by them authorized or appointed, to give and grant to any of the students of the said university, or to any person or persons thought worthy thereof all such degrees as well in divinity, philosophy, civil and municipal laws, as in every other art, science and faculty whatsoever as are or may be conferred by all or any of the universities in Europe, and that the chancellor or in his absence the vice-chancellor of the said university for the time being do sign and seal with the seal of the said corporation diplomas or certificates of such degrees having been given, other than the degree of bachelor of arts, which shall and may be granted by the president of the college in which the person taking the same shall have been graduated, and the diplomas shall be signed by the said president. That the persons to be elected fellows professors or tutors as aforesaid, be also regents of the said university, *ex officiis* and capable of voting in every case relative only to the respective colleges to which they shall belong, excepting in such cases wherein they shall respectively be personally concerned or interested.

AND BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID That the college within the city of New York heretofore called Kings College, be forever hereafter called and known by the name of Columbia College.

Article First of Title i of Chapter XV of Part 1 of the Revised Statutes contains the following:—(Vol. 1, p. 456).

"Section 1. An university is instituted in this "State, of which the government is, and shall con- "tinue to be, vested in a board of regents.

"§ 2. This university is incorporated under, and is "and shall be known by, the name of 'The Regents "'of the University of the State of New York'; and "by that name shall have perpetual succession, "power to sue and be sued, to make and use a com- "mon seal and alter the same at pleasure, to hold "property, real and personal, to the amount of the "annual income of forty thousand bushels of wheat, "and to buy and sell, and otherwise dispose of, "lands and chattels."

Chapter 378, Laws 1892.

"§ 3. CORPORATE NAME AND OBJECTS.—

"The corporation created in one thousand seven "hundred and eighty-four under the name of "Regents of the University of the state of New "York shall continue and be known as University "of the state of New York. Its objects shall "be to encourage and promote higher education, "to visit and inspect its several institutions and "departments to distribute to or expend or ad- "minister for them such property and funds as "the state may appropriate therefor or as the "University may own or hold in trust or other- "wise, and to perform such other duties as may "be intrusted to it.

"§4. REGENTS.—The University shall be governed "and all its corporate powers exercised by nine- "teen elective regents, and by the governor, "lieutenant-governor, secretary of state, and "superintendent of public instruction, who shall "be ex-officio regents. In case of the death, resig- "nation, refusal to act or removal from the state, "of any elective regent, his successor shall be "chosen by the legislature in the manner provided "by law for the election of senators in congress, "except that the election may take place at such "time during the session of the legislature as it "may determine. No person shall be at the same "time an elective regent of the University and a "trustee, president, principal, or any other officer "of any institution belonging to the University."

"§ 10. DEPARTMENTS AND THEIR GOVERNMENT. "—The state library and state museum shall be "departments of the University, and the regents "may establish such other departments as they "deem necessary to discharge the duties imposed "on them by law. All University departments

"shall be under exclusive control of the regents "who shall have all powers of trustee thereof, in- "cluding authority to appoint all needed officers "and employees; to fix their titles, duties, salaries "and terms of service; to make all needed regula- "tions; and to buy, sell, exchange or receive by "will, gift, *or on* DEPOSIT, articles or collections "properly pertaining thereto;"

"§ 54. CONSTRUCTION.—The provisions of this "act, so far as they are substantially the same as "those of the laws herein repealed, shall be con- "strued as a continuation of such laws, modified "or amended according to the language employed "in this act, and not as new enactments. Repeals "in this act shall not revive any law repealed by "any law hereby repealed, but shall include all "laws amendatory of the laws hereby repealed. "References in laws not repealed to provisions of "law incorporated in this chapter and repealed "shall be construed as applying to the provisions "so incorporated. Nothing in this act shall be "construed to repeal any provision of the Criminal "or Penal Code."

"SCHEDULE OF LAWS REPEALED.

"LAWS OF	CHAPTER.	SECTION.
"Revised Laws of 1813.	59	All."*
"Revised Statutes, part 1.	15, title 1.	All."

*Chapter 51, Laws 1784 (printed above) as amended by chapter 82, Laws 1787 (1 Greenl. 434).

Chapter 586, Laws 1896.

"AN ACT to provide for the collection of historical and ethnologic records and relics of the "American Indians of the state of New York, and "making an appropriation therefor."

"Section 1. There shall be made, as the Indian "section of the state museum, as complete a collection as practicable of the historical, ethnographic "and other records and relics of the Indians of the "state of New York, including implements or "other articles pertaining to their domestic life, "agriculture, the chase, war, religion, burial and "other rites or customs, or otherwise connected "with the Indians of New York.

"§ 2. The trustees of the state museum ('the "regents') shall appoint on its staff a competent "curator*, without salary, to make and arrange "this Indian collection, and for his necessary expenses, and for collecting or buying specimens "for the Indian collection, there shall be paid by "the treasurer, on the warrant of the comptroller, "from any money not otherwise appropriated, not "to exceed five thousand dollars."

*Mr. Richmond, the witness of that name in this case, was appointed and served without compensation, until his death last fall.

Chapter 791, Laws 1897, Section 1 (Vol. 1, p. 858).

"For additions to the Indian Museum, in accord-
"ance with chapter five hundred and eighty-six
"of the laws of eighteen hundred and ninety-six,
"providing that the curator shall serve without
"salary, the sum of two thousand dollars."

Chapter 606, Laws 1898, Section 1 (Vol. 2, p. 1436).

"For additions to the Indian Museum, in ac-
"cordance with chapter five hundred and eighty-
"six, laws of eighteen hundred and ninety-six,
"provided that the curator shall serve without
"salary, two thousand dollars."

"Chap. 153 Laws 1899.

"AN ACT to collect and preserve from loss or "injury any and all wampums which the Onon- "daga nation of Indians, or its wampum keeper, "or any of the Ho-de-no-sau-nee, otherwise known "as the Five Nations, or the Six Nations, or the "Iroquois, is entitled to possess."

"Section 1.—The university of the state of New "York, which was duly elected to the office of "wampum-keeper by the Onondaga nation, on "February twenty-sixth, eighteen hundred and "ninety-eight, and which by unanimous action of "its regents on March twenty-second, eighteen "hundred and ninety-eight, accepted such election "as authorized to do by law, and which accepted "the custody of the wampums as formally trans- "ferred to the chancellor as part of the exercises "and with the unanimous approval, both of the "election and transfer, by the council of the Five "Nations, held in the senate chamber of the capi- "tol at Albany on June twenty-second, eighteen "hundred and ninety-eight, by duly chosen repre- "sentatives of all the original nations of the Ho- "de-no-sau-nee, shall hereafter be recognized in "all courts and places, as having every power "which has ever, at any time, been exercised by "any wampum-keeper of the Onondaga Nation, or "of any of the Ho-de-no-sau-nee, otherwise known "as the Five Nations, or the Six Nations, or the "Iroquois, and shall keep such wampums in a fire "proof building, as public records, forever, and is "hereby authorized to secure by purchase, suit, or "otherwise, any wampums which have ever been in "the possession of any of the Ho-de-no-sau-nee, or "any preceding wampum-keeper, and which is now "owned by any of them or to which any of them "is entitled, or to which it is entitled in law or in

"equity; and to maintain and carry on suit to "recover any of such wampums in its own name "or in the name of the Onondaga nation at any "time notwithstanding that the cause of action "may have accrued more than six years, or any "time, before the commencement of any such "suit.

"§ 2. The provisions of this act shall not apply "to the subject matter of any litigation now pend- "ing in any court of this state.

"§ 3. This act shall take effect immediately."

Chapter 569, Laws 1899 (vol. 2, p. 1206).

"For additions to the Indian Museum, in accordance "with chapter five hundred and eighty-six laws of "eighteen hundred and ninety-six provided the curator "shall serve without salary, one thousand dollars."

ARTICLES

Concluded at Fort Stanwix, on *the twenty-second Day of October, one thousand seven hundred and eighty-four*, between Oliver Wolcott, Richard Butler, *and* Arthur Lee, *Commissioners Plenipotentiary from the United States, in Congress assembled, on the one Part, and the* Sachems *and* Warriors *of the* Six Nations, *on the other.*

The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection upon the following conditions:

Article I.

Six hostages shall be immediately delivered to the commissioners by the said nations, to remain in possession of the United States, till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas and Cayugas, or by any of them, in the late war, from among the people of the United States, shall be delivered up.

Article II.

The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

Article III.

A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing-Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying-path, between Lake Erie and Ontario, to the mouth of the Tehoseroron or Buffaloe Creek on Lake Erie; thence south to the north boundary of the state of Pennsylvania;

thence west to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line from the mouth of the Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the Port of Oswego, to the United States, for the support of the same.

ARTICLE IV.

The Commissioners of the United States, in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States upon the signing of the above articles, will order goods to be delivered to the said Six Nations for their use and comfort.

2 Folwell, 299.

7 Stat. at Large, 15.

GEORGE WASHINGTON, PRESIDENT OF THE UNITED STATES OF AMERICA.

To all to whom these presents shall come GREETING:

WHEREAS a treaty of Peace and Friendship between the United States of America and the Tribes of Indians called the Six Nations, was made and concluded on the Eleventh day of November last by Timothy Pickering the Agent of the United States for that purpose appointed, on the one part and the Chiefs and Warriors of the Six Nations on the other part which Treaty is in the form and words following:

A TREATY

BETWEEN THE

UNITED STATES OF AMERICA,

AND THE

TRIBES OF INDIANS

CALLED THE

SIX NATIONS.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE III.

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps, the line runs westerly along the lake as far as O-yong-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, above Fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the northeast corner of a triangular piece of land which the United

States conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelps's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the above mentioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing there, and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V.

The Seneka Nation, all others of the Six Nations concurring, cede to the United States the right of making a waggon road from Fort Schlosser to Lake Erie, as far south as Buffaloe Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the

people of the United States a free passage through their lands, and the free use of the harbours and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole four thousand five hundred dollars; which shall be expended yearly forever in purchasing cloathing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated to be made by the Superintendent appointed by the President for the affairs of the Six Nations, and their Indians friends aforesaid.

ARTICLE VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals,

the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make equitable provisions for the purpose.

NOTE.—It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside without the boundaries of the United States: For the United States do not interfere with nations, tribes or families of Indians elsewhere resident.

IN WITNESS whereof, the said Timothy Pickering, and the Sachems and War chiefs of the said Six Nations, have hereto set their hands and seals.

DONE *at Kon-on-daigua, in the State of New York, the eleventh day of November, in the Year one thousand seven hundred and ninety-four.*

TIMOTHY PICKERING	(L. S.)
O-no-ye-ah-nee, x	(L. S.)
Kon-ne-at-or-lee-ooh, x *or Handsome Lake.*	(L. S.)
To-kenh-you-hau, x *alias Capt. Key.*	(L. S.)
O-nes-hau-ee, x	(L. S.)
Hendrick Aupaumut,	(L. S.)

David Neesoonhuk, x (L. S.)
Kanatsoyh, *alias Nicholas Kusick.* (L. S.)
So-hon-te-o-quent, x (L. S.)
Oo-duht-sa-it, x (L. S.)
Ko-nooh-qung, x (L. S.)
Tos-song-gau-lo-lus, x (L. S.)
John Sken-en-do-a, x (L. S.)
O-ne-at-or-lee-ooh, x (L. S.)
Kus-sau-wa-tau, x (L. S.)
E-yoo-ten-yoo-tau-ook, x (L. S.)
Kohn-ye-au-gong, *alias Jake Stroud.* (L. S.)
Sha-gui-e-sa, x (L. S.)
Teer-oos, x *alias Capt. Prantup.* (L. S.)
Soos-ha-oo-wau, x (L. S.)
Henry Young Brant, x (L. S.)
Sonh-yoo-wau-na, x *or Big Sky.* (L. S.)
O-na-a-hah, x (L. S.)
Hot-osh-a-henh, x (L. S.)
Kau-kon-da-nai-ya, x (L. S.)
Non-di-yau-ka, x (L. S.)
Kos-sish-to-wau, x (L. S.)
Oo-jau-geht-a, x *or Fish Carrier.* (L. S.)
To-he-ong-go, x (L. S.)
Oot-a-guas-so, x (L. S.)
Joo-non-dau-wa-onh, x (L. S.)
Ki-yau-ha-onh, x (L. S.)
Oo-tan-je-au-genh, x *or Broken Axe.* (L. S.)
Tau-ho-on-dos, x *or Open the Way.* (L. S.)
Twan-ke-wash-a, x (L. S.)
Se-qui-dong quee, *alias Little Beard.* (L. S.)
Kod-je-ote, x *or Half Town.* (L. S.)
Ken-jau-au-gus, x *or Stinking Fish.* (L. S.)
Soo-noh-quau, Kau, x (L. S.)
Twen-ni-ya-na, x (L. S.)
Jish-kaa-ga, x *or Green Grass-hopper, alias Little Billy.* (L. S.)

Tug-geh-shot-ta, x (L. S.)
Téh-ong-ya-gau-na, x (L. S.)
Téh-ong-yoo-wush, x (L. S.)
Kon-ne-yoo-we-sot, x (L. S.)
Ti-ooh-quat-ta-kau-na, x *or Woods on Fire.* (L. S.)
Ta-oun-dau-deesh, x (L. S.)
Ho-na-ja-wus, x *alias Farmer's Brother.* (L. S.)
Sog-goo-ya-waut-hau, x *alias Red Jacket.* (L. S.)
Kon-yoo-ti-a-yoo, x (L. S.)
Sauh-ta-ka-ong-yees, x (*or Two Skies of a length.*) (L. S.)
Oun-na-shatta-kau, x (L. S.)
Ka-ung-ya-néh-quee, x (L. S.)
Soo-a-yoo-wau, x (L. S.)
Kau-je-a-ga-onh, x *or Heap of Dogs.* (L. S.)
Soo-nooh-shoo-wan, x (L. S.)
T-ha-oo-wau-ni-as, x (L. S.)
Soo-nong-joo-wau, x (L. S.)
Kiant-whau-ka, x, *alias Cornplanter.* (L. S.)
Kau-neh-shong-goo, x (L. S.)

WITNESSES.

Israel Chapin,	William Shepherd, jun.,
James Smedley,	John Wickham,
Augustus Porter,	James K. Garnsey,
Wm. Ewing,	Israel Chapin, jun.

Interpreters { Horatia Jones, Joseph Smith, Jasper Parish.

Henry Abeele.

NOW KNOW YE, that I having seen and considered the said Treaty, do by and with the advice and consent of the Senate of the United States accept ratify and confirm the

same and every article and clause thereof. In Testimony whereof, I have caused the seal of the United States to be hereunto affixed, and signed the same with my hand.

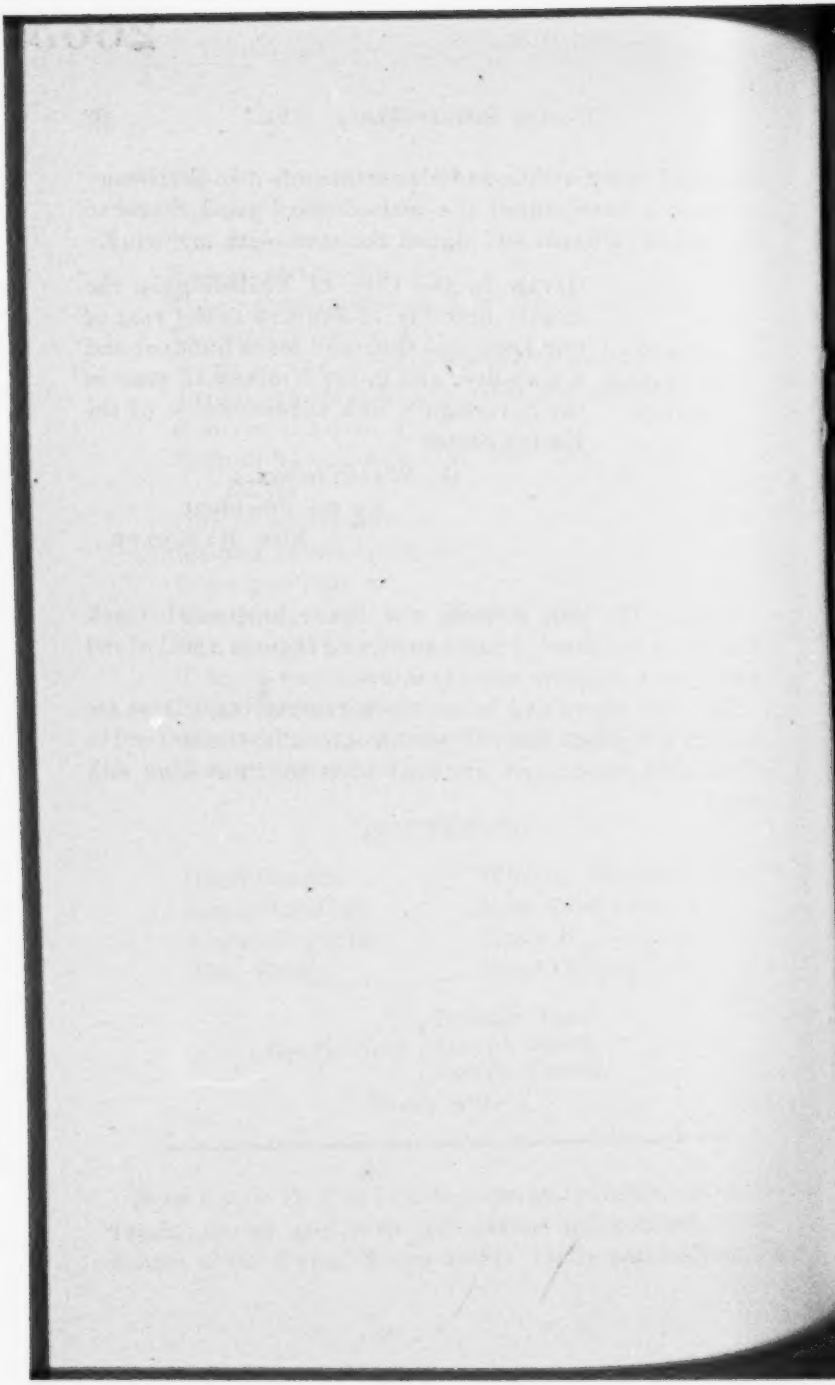
SEAL OF THE UNITED STATES

GIVEN in the City of Philadelphia, the twenty-first day of January in the year of our Lord one thousand seven hundred and ninety-five, and in the Nineteenth year of the Sovereignty and Independence of the United States

G° WASHINGTON
By the President
EDM. RANDOLPH

NOTE.—The part *between* the heavy horizontal black lines is on one sheet of parchment, and there is a seal of red sealing wax opposite each signature.

The parts above and below the horizontal black lines are each on a separate strip of parchment—of the entire width of the main sheet—and attached to it by light blue silk braid.



Appropriation Bill of March, 1901.

31 Stat. at Large, p. 1064.

"SIX NATIONS OF NEW YORK.

"For permanent annuity, in clothing and other useful "articles, per sixth article of treaty of November elev- "enth, seventeen hundred and ninety-four, four thousand "five hundred dollars."

"Approved March 3, 1901" (p. 1085).

There is an United States agent for this (1 Off. Reg. 772).

And they are just as numerous as they were in the days of their great Indian Empire (R. 90).

The Jesuit Relation of 1664–65 (pp. 46–47) gives the following estimate of warriors:

Mohawks	300–400
Oneidas	140
Onondagas	300
Cayugas	300
Senecas	1200
	2340

By the usual historical estimates—five to one—this will give a population of 11,700.

In describing the funeral of "le Rat" Parkman says: ("Count Frontenac and New France," Champlain ed., Boston 1897–2, p. 229) "Pre-eminent among them all "sat their valiant and terrible foes, the warriors of the "confederacy. 'Strange,' exclaims La Potherie, 'that

" ' four or five thousand should make a whole new world
" ' tremble. New England is but too happy to gain their
" ' good graces; New France is often wasted by their
" ' wars, and our allies dread them over an extent of
" ' more than fifteen hundred leagues.' It was more a
" marvel than he knew, for he greatly overrates their
" number."

2005